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38TH CONGRESS, 2d Session. } HOUSE OF REPRESENTATIVES. { MISS. DOC. No. 57.

CASES

OF

CONTESTED ELECTIONS IN CONGRESS,

FROM

1834 TO 1865, INCLUSIVE.

COMPILED BY D. W. BARTLETT,
CLERK TO THE COMMITTEE OF ELECTIONS.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1865.

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PREFACE.

In compiling a new volume of "Contested Elections," as a continuation of the volume published in 1834, it has been found necessary to eliminate all irrelevant matter, and adhere closely to the facts and the law. When the first volume was published, the debates in Congress as reported were exceedingly brief. To publish all the speeches made in Congress upon contested election cases since 1834 would require several volumes; hence only brief extracts have been taken, which seemed to be necessary for the full explanation of the law and the facts in the case. A reference is made in each case to the debate so that it can be readily found.

The majority report is always given, and the minority report whenever the resolutions reported by the majority were overruled; as well as in some of the more important cases. The chief points in each case are stated by way of prefix, and its history in Congress is appended to the report. The index will enable the reader to readily find not only every case, but every point raised and discussed in it.

The references to documentary evidence in the reports have not been omitted, (following the example of the Massachusetts election reports and similar works,) though that evidence is not published herewith. The references may be convenient in some cases.

The Senate cases were generally debated at great length, and, with two or three exceptions, no extracts have been made from the arguments. Where the reports failed to give a clear statement of the law and the facts, however, they have been extracted from the Senate debates.

IN THE HOUSE OF REPRESENTATIVES, *February* 11, 1865.

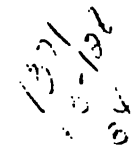
On motion of Mr. DAWES, from the Committee of Elections,

Resolved, That there be printed, for the use of the members of the House, the usual number of copies of the Digest of Election Laws made, under the order of the House, by the clerk of the Committee of Elections, together with a full index to the same, to be prepared by the said clerk, for which, and for the necessary revision and superintendence connected therewith, he shall be paid by the Clerk of the House a per diem for the days actually employed herein, not exceeding that paid to clerks of committees during the session of Congress.

FEBRUARY 17, 1865.

On motion of Mr. A. W. CLARK, from the Committee on Printing,

Resolved, That there be printed one thousand extra copies of the Digest of Election cases, including the cases which have occurred during the present Congress, for the use of this House.



CASES

OF

CONTESTED ELECTIONS IN CONGRESS.

TWENTY-FOURTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. CLAIBORNE, Virginia.
GRIFFIN, South Carolina.
HAWKINS, North Carolina.
HARD, New York.
BURNS, New Hampshire.
Mr. KILGORE, Ohio.
A. BUCHANAN, Pennsylvania.
MAURY, Tennessee.
BOYD, Kentucky.

NEWLAND *vs.* GRAHAM, *of North Carolina.*

Where testimony not given under oath was offered—Held, that it was inadmissible.

The judges of elections having ascertained that certain votes had been, by mistake, put into the "legislative box," when they were intended for members of Congress, transferred the votes to the "congressional" box. The committee left it to the House to decide whether the vote should stand.

The seat was vacated.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 24, 1836.

Mr. BOYD, from the Committee of Elections, to whom the subject had been referred, submitted the following report:

That the late election for a member of the House of Representatives of the United States, for the 12th congressional district of the State of North Carolina, took place on the 13th day of August last. That the law of North Carolina, in cases of contested elections, requires thirty days' notice previous to the meeting of the general assembly of an intention to dispute the election, with the ground on which the same will be disputed, to be given by the person objecting to the individual declared elected; and that the same notice of time and place now required in taking depositions at law shall also be required and proven on such investigation.—(2 vol. Revised Code, 827, chap. 466, 1796.)

That notice was served on the sitting member on the second day of October last by the petitioner that he intended to contest his election, on the ground that illegal and unqualified votes had been given for him, and that legal and qualified votes offered for the petitioner had been rejected; that a notice was afterwards served on the sitting member, on the 18th day of October last, by the petitioner, stating that on the 29th day of October thereafter he should proceed to take the depositions of Jas. D. Justice and others at Asheville, which

depositions were to be used and read as evidence before the House of Representatives of the United States in the case in which he contested his election. Various other similar notices were subsequently served on the sitting member for taking depositions at other times and places, and similar notices were also served on the petitioner by the sitting member for taking depositions in his behalf. At the times and places thus notified the parties or their agents respectively met, and the depositions thus taken have been sent on to the Speaker of the House, and have been delivered over to the committee.

The petitioner and sitting member appeared before the committee on the 15th day of December last, and an objection having been made by the sitting member to the said depositions as inadmissible evidence of the facts stated in them, that question was taken up and considered by the committee, after hearing the arguments of the sitting member and the petitioner thereon. The committee was of opinion that the depositions had been taken conformably to the laws of North Carolina upon the subject of contested elections; and there being no law of Congress on the subject, and the usage being well established to allow depositions to be read which had been taken and sworn to according to the laws of the State where the election had been held, and it appearing reasonable that depositions thus taken on similar notices from both parties, and in the presence (with one exception) of both parties or their agents, ought to be held sufficient, decided that they should be received.

This decision of the committee was made known to the parties in the controversy on the 14th day of January last, and on the day following the sitting member made an application to be allowed further time, to the last day of February then next, to take additional testimony on his part. See papers marked J. G. This was objected to by the petitioner, on the grounds stated in the paper, dated 15th January, marked D. N.

The committee, after hearing the arguments of the sitting member and the petitioner, rejected this application. They could find no precedent in which an application of a similar kind, even if made at an earlier period, had been granted, but several in which, notwithstanding the existence of more favorable circumstances, such applications had been rejected, both by Committees of Election and by the House. Without very strong reasons to show the necessity of further proof, (which the committee did not see in this case,) they considered that the right of contesting a seat in Congress would be useless and nugatory, if such postponements and protracted appointments for taking additional evidence after the meeting of Congress should be allowed, when the parties had already had the same time to take their depositions, and, as appeared to the committee, a sufficient time. After this determination, the committee proceeded to examine the testimony, to hear the objections and statements of the petitioner and sitting member, and to determine from the evidence what votes should be taken from or added to their polls, as returned respectively. Several legal questions, as to the competency of certain parts of the evidence, arose in this investigation.

The sitting member objected to a number of the petitioner's depositions which contained declarations proved by the witnesses to have been made after the election by the voters therein named, of their having voted at the same election for the sitting member. He contended that these, being the declarations of persons not on oath, were inadmissible. It was contended by the petitioner that, as the law of North Carolina (Revised Code, 922, 1800, ch. 557) requires voting by ballot, and enacts that the voters shall not be compellable to give evidence for whom they voted, there could be no better evidence, and no other evidence in most cases, than the voter's declarations; that the voter's testimony being excluded, he ought to be allowed to produce the next best evidence in his power. The petitioner claimed, under this species of evidence, to deduct from the poll[illegible] sitting member thirty-five votes which were thus proved to have

been given for him, and which he contended the depositions showed were illegal votes, the voters not possessing the requisite qualifications. The committee, however, deemed this species of evidence inadmissible, and did not, therefore, investigate the votes of the sitting member objected to under this head. This decision confined the inquiry to cases of bad or illegal votes alleged to be found on the polls of the parties respectively, as proved by other evidence than the declarations of the voters. After a carêful examination of the proofs on both sides, the committee find nineteen votes (see list marked A) which they consider bad, and which are sufficiently proved to have been given for the sitting member. That number, therefore, ought to be deducted from his poll. They also find eight bad votes, proved by the same sort of evidence, to have been given for the petitioner, and which are to be taken from his poll; leaving the difference eleven, and exceeding the sitting member's majority of seven, as returned, by four votes. To these the committee have thought proper to add three votes as given for the petitioner at Henderson precinct, in Buncombe county, and stricken from his poll by the judges at Asheville on comparing the polls the day after the election.

The law of North Carolina gives no power to the judges at one place of election to strike off votes or in any manner alter the return of the judges of any other place of election; nor could the judges at the Henderson precinct, after taking the votes as legal, decide themselves, or authorize the judges at Asheville to decide, that they were illegal. Having been received at the time of the election, the petitioner is entitled to them, unless they are proven to be bad; no such proof was presented. This makes the petitioner's majority seven. To this the committee have added five votes, (see list A,) as having been legally offered for the petitioner, and illegally refused; thus making his majority twelve. The committee return also herewith a list of the votes contended by the petitioner to have been illegally given to the sitting member, under that species of evidence rejected by the committee, of declarations proved to have been made by the voters, (marked B,) so that the House, if they should deem such evidence improperly rejected by the committee, may, by resorting to the depositions, ascertain the sufficiency of the proof. They also return, filed herewith, papers marked C and D, showing the objections of petitioner, and the votes claimed by him; said papers, and paper B, being presented by him. It appears from the evidence, that at Franklin, in Macon county, some ballots for members of Congress were put by mistake in the boxes for receiving votes for the State legislature, and some ballots for members of the State legislature into the box for members of Congress; the election for both the State legislature and Congress being held at the same time and place, the boxes being in the same room for receiving the ballots, and about seven or eight feet apart.

The testimony of Robert Hall, one of the judges, is, that he and the other judges, hearing of votes being put in the wrong boxes—that is, some in the legislative boxes that were intended for members of Congress, and *vice versa*—had them changed. He does not state how many ballots were thus changed, nor who they were for. Another witness, James W. Killian, says he saw the exchange of tickets at the close of the election, and that five or six for Newland were taken from the legislative box, and perhaps some for Graham, he does not recollect; and some were taken from the Congress box, in like manner, and transferred to the legislative box. It appears, then, that the judges of election corrected what they were all satisfied was a mistake, by transferring the ballots into the right boxes from those in which they had been by mistake deposited. Robert Hall further states, that it is customary to correct such mistakes; and it is easy to conceive that such mistakes might, under such circumstances, be committed, which the judges, before counting the ballots, might correct. There is no positive proof to show how many ballots were thus exchanged, nor who they were all for. Killian says there were five or six for Newland, and perhaps

some for Graham, he does not recollect. It would therefore be difficult, in the opinion of the committee, if not impossible, from the testimony, to determine accurately how many of the five or six proven to have been for the petitioner should be taken from his poll, if it should be thought that any should be deducted, as it is left quite uncertain whether there were not some for the sitting member. The judges no doubt acted in good faith; the mistake appears to have been corrected by them on the spot, and with every means of ascertaining the fact of the mistake, and without objection, and in a manner usual, as stated by Hall, on such occasions. If the House should think it right, under these circumstances, to interfere with their decision in correcting this mistake, the five or six votes thus given by the judges to petitioner can be deducted from the amount of his majority before mentioned. The committee found, on referring to the case of Washburn and Ripley, (Contested Elections, page 679,) that the House had refused to interfere with a decision of the judges of election in that case, who declined correcting the mistakes made in that election, by depositing the ballots in the wrong boxes. The judges of this election in Maine, it seems from this case, did not consider it to be in their power to correct such a mistake. They may have considered that they had no means of ascertaining whether it was a mistake or not. It appears, from that case, that the ballots are put into the boxes by the voters themselves; and it would seem, from several of the depositions in this case, that the ballots were usually handed to one of the judges or inspectors of the election, and by him deposited in the ballot-box, as the law of North Carolina requires. In this case, then, the mistake having been made by one of the judges, and not by the voter, who had done everything in his power towards the fair exercise of his privilege, the judges have considered it their duty to correct their own mistake, and give the voter his vote; and as they have considered that they had the means of fairly correcting the mistake, they proceeded to do so openly, and without objections of the friends of either of the candidates. Under such circumstances, the committee leave it to the House to say whether their proceeding should not be respected, and their return allowed to stand as they have placed it. Several objections were made by each of the parties to certain alleged irregularities in the proceedings of the officers by whom the elections were held at several places of voting in the said district. As, however, the committee entertain no doubt as to the fairness of the elections, and the integrity and impartiality of the officers, and as no objection appears to have been made at the time to the particular proceeding or formality which is now objected to, they have considered it unnecessary to say anything further as to those objections, than that the proceeding complained of might be deemed to have been waived or assented to, and are not, in the judgment of the committee, sufficient to affect the validity of the election, or to change the result to which the committee have arrived.

On the whole, the committee submit the following resolutions:

1. That James Graham is not entitled to a seat in this house.
2. That David Newland is entitled to a seat in this house.

In the House a motion was made to give the sitting member further time to take testimony; but it was lost.

Mr. RENCHER, of North Carolina, moved the subjoined resolutions:

1. *Resolved*, That the depositions which have been communicated to the House by the Speaker, and laid on the table since the report of the Committee of Elections was made, whenever taken upon due notice, will be received by the House as testimony in this case.

2. *Resolved*, That the five votes taken from the commons box at the Franklin precinct, in Buncombe county, and counted for the petitioner, ought not to be counted.

3. *Resolved*, That the three votes which were stricken from the petitioner's roll by the judges at Asheville, in Buncombe county, because it appeared by the return of the judges from the Henderson precinct that those of the votes given the petitioner were given by voters living

in Yancey county, and which have now been added to his poll by the committee, ought not to be allowed.

4. *Resolved*, That two votes (to wit, Robert Lankford and George Barkley) stricken from the roll of the sitting member by the committee, on the ground that they voted out of their propor county, ought to be restored, because there is no proof that they lived out of the county in which they voted.

5. *Resolved*, That two votes (to wit, Moses Pace and Andrew Morrison) which were proven by parol testimony to have been given for James Graham, out of the county in which they reside, and on that account have been stricken from his poll by the committee, ought to be restored, because it does not appear from the poll-books themselves that either of these men voted at the election.

6. *Resolved*, That William H. Milton ought to be stricken from the poll of the petitioner, because it appears that he had not paid a public tax.

7. *Resolved*, That the five votes found on page 6 of the report, which have been counted for the petitioner, but which were not given in at the polls, ought not to be counted.

8. *Resolved*, That there is no evidence that these men were qualified to vote, not having lived in the county where they offered to vote twelve months immediately preceding the day of election, as required by the constitution of North Carolina, or that they tendered their votes as required by the law of that State.

They were decided by the Speaker to be out of order, and the House was brought to a direct vote upon the first resolution of the committee—that Mr Graham, the sitting member, was not entitled to his seat. The vote stood, yeas 114, nays 87. Upon the second resolution, that Mr. Newland *was* entitled to the seat, the vote stood, yeas 99, nays 100. The seat was then declared vacant.

NOTE.—The debate upon this case covered a period of several months, and was, for the most part, upon preliminary questions. Mr. Newland's speech will be found on page 240, volume 3, Congressional Globe; Mr. Graham's on pages 240 and 241. The running debate upon the case occupies from page 240 to 272, volume 3, Congressional Globe.

TWENTY-FIFTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. A. BUCHANAN, Pennsylvania.
GRIFFIN, South Carolina.
HAWKINS, North Carolina.
KILGORE, Ohio.
MAURY, Tennessee.
Mr. TOWNES, Georgia.
BRONSON, New York.
PENNYBACKER, Virginia.
HASTINGS, Massachusetts.

THIRD SESSION.

Messrs. RIVES, of Virginia, and SWEARINGEN, of Ohio, in place of KILGORE and PENNYBACKER.

Messrs. GHOLSON and CLAIBORNE, *of Mississippi.*

The President having called an extra session of Congress before the regular congressional election in Mississippi, the governor of that State issued his proclamation for a special election of members for the called session only. The committee and the House held that the members elected—Messrs. Gholson and Claiborne—were entitled to seats during the entire 25th Congress.

At the second session two contestants appeared with credentials, showing that they were elected at the regular November election in Mississippi. The House rescinded its action during the first session, and vacated the seats.

The facts in this case are simple. The President of the United States called Congress to meet in extra session in September. The State of Mississippi was without representation in the House of Representatives, not having held its regular congressional election. The governor of the State issued a proclamation fixing a day for an election of members *for the extra session*. The election was held, and Messrs. Gholson and Claiborne were returned. When their names were called at the organization of the House, objection was made, but it was overruled, and the subject was referred to the Committee of Elections. Their report was as follows:

IN THE HOUSE OF REPRESENTATIVES.

SEPTEMBER 25, 1837.

Mr. BUCHANAN, from the Committee of Elections, to whom the subject had been referred, made the following report:

They find a clause in the Constitution of the United States as follows: "When vacancies happen in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies." They also find that, by the same instrument, "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof."

They also find certain sections extracted from a law of the State of Mississippi, in the following words:

AN ACT to regulate elections in this State. Approved March 2, 1833.

SEC. 1. *Be it enacted by the legislature of the State of Mississippi*, That all elections for representatives to the legislature shall be held at the court-houses or places of holding courts in the several counties of this State, unless otherwise specially provided for by law. And the times of holding such election shall be the first Monday and day following in November biennially. And all elections for senators in the legislature, for governor, representatives to Congress, sheriffs, coroners, and all other State and county officers directed by the Constitution to be biennially elected, shall be held at the same places and on the same days of the year in which they are respectively chosen, as are therein directed in the case of representatives to the legislature.

SEC. 2. The sheriff of each county in this State shall, at least thirty days previously to the time for holding any election in his county, by advertisement, set up at the door of the court-house and three other public places in his county, notify the inhabitants of the time and place or places of such elections, and what offices are to be filled by such election; and the sheriff, on the days of election, shall open the poll at ten o'clock in the morning and continue the same open until four o'clock in the evening of each day, and no longer. In case a vacancy happen, and a writ of election shall be issued to the sheriff, the sheriff shall advertise the said election, and give a time as near the thirty days as the period of elections will allow, provided it be not less, in any case, than ten days.

SEC. 7. The representatives to Congress from this State shall be elected by the qualified electors, at the time of choosing representatives to the legislature, once in every two years, to be computed from the first Monday in November, in the year 1833; and the returning officer in each county shall, within fifteen days after each election, certify under his hand and seal to the secretary of state the whole number of votes given in his county to each candidate for Congress; and it shall be the duty of the secretary of state to sum up the whole number of votes thus returned, and declare the candidates elect, who may have the greatest number of votes, by publication in some newspaper published at or nearest to the seat of government. It shall be the duty of the governor to deliver to the persons duly elected proper credentials, under his hand and the great seal of the State, which shall entitle them to a seat in the body of which they are elected members.

SEC. 10. All elections for governor, representatives to Congress, sheriffs, and other county officers, shall be held and conducted in the same manner; provided, that the returns for every election for governor shall be made in the manner prescribed in the Constitution.

The committee further find that the governor of the State of Mississippi issued writs of ele as follows, viz:

By Charles Lynch, governor of the State of Mississippi.—To the sheriff of ——— county, greeting:

Whereas the President of the United States has convoked Congress to meet on the first Monday of September next; and whereas a vacancy has occurred in the representation of the State of Mississippi in the House of Representatives of the Congress of the United States, by the expiration of the term of service for which Messrs. Claiborne and Gholson were elected:

I do therefore issue this writ, authorizing and requiring you to hold an election in your county on the third Monday and day following in July next, for two representatives to Congress, to fill said vacancy, until superseded by the members to be elected at the next regular election on the first Monday and day following in November next; and I do moreover enjoin you to conduct the same, in all respects, conformably to law, and make due return thereof to the secretary of state.

In testimony whereof, I have hereunto set my hand and caused to be affixed the great seal of State, at the town of Jackson, this 13th day of June, 1837.

It appears by a certificate of the secretary of state, that elections were held in fifty of the counties of the State of Mississippi, the result of which was, that the sitting members were elected by large majorities.

From a consideration of the foregoing documents and circumstances, it would seem as if the people of Mississippi had a fair and full opportunity of expressing themselves as to who should represent them in the twenty-fifth Congress. No objection is made from any quarter to the right of the gentlemen elect to their seats, only by and through themselves: on account of the peculiar circumstances under which the election was held, their own delicacy and sense of propriety have prompted them to invite a scrutiny into their right to seats in this House. In the course of the scrutiny and investigation, the attention of the committee has been called to two points, which are supposed to comprehend the only possible objections to the retention of their seats by the sitting members. The first point is that clause of the writ issued by the governor, wherein the election is directed to be held for two representatives in Congress, to fill the vacancy until superseded by the members to be elected at the next regular election, on the first Monday and day following in November next. The committee are (with one exception) of opinion that in attempting to restrict the term of service of the members to be elected at the special election ordered as before stated, till the next regular election in November next, the governor transcended his powers. The gentlemen elected are members for the whole unexpired term of the twenty-fifth Congress, or they are not members at all. The question then recurs—Did that illegal and restricting clause in the writ invalidate the election? The committee were almost unanimous in the opinion that inasmuch as the writ was perfect in itself without that clause, its being there does not invalidate the election held under it, but may fairly be rejected as surplusage: reject this as surplusage, then the writ is good, and the objection amounts to nothing.

But the second objection, which would seem to be more formidable, involves the question whether, in the purview and meaning of the Constitution, such vacancy in the representation of the State had happened as would justify the governor in authorizing a special election to fill it. On this question the committee were divided. A majority of them were of opinion that a vacancy existed, and such a vacancy as was pregnant with all the evils which could arise from a vacancy happening in any other manner; and as the words of the Constitution are broad enough to embrace the existing case, there is no good reason why, in giving them a practical construction, they should not be considered applicable as affording a remedy in this case as well as those arising from death or resignation. It is evident that all the evils arising from vacancies by death or resignation would exist in a vacancy produced by the expiration of the term of members prior to the election of their successors; and as the words used by the framers of the Constitution will fairly admit of the construction contended for,

we are not at liberty to say the remedy prescribed was not intended for this case. On the contrary, the committee are of opinion the Constitution authorizes the executive power of the States respectively to order the filling of all vacancies which have actually happened, in the mode therein pointed out, no matter how the vacancy may have happened, whether by death, resignation, or expiration of the term of members previous to the election of their successors. The word "happen," made use of in the Constitution, is not necessarily confined to fortuitous or unforeseen events, but is equally applicable to all events which by any means occur or come to pass, whether foreseen or not; and as in this case confessedly the vacancy existed, it may properly be said to have happened, although the means or circumstances by which it was brought about may have been foreseen. With these views, fortified by many others which might be advanced, a majority of the committee have agreed on the following resolution, and instructed their chairman to report the same to the House:

Resolved, That Samuel J. Gholson and John F. H. Claiborne are duly elected members of the 25th Congress, and, as such, are entitled to their seats.

The House debated the case at length. The subjoined extracts indicate it character:

Mr. PENNYBACKER gave the reasons at some length which had operated upon his mind, as well as that of the majority of the committee, in coming to the conclusion he did. The facts of this case had been set specially by the committee in their report, and they were briefly and simply these. Messrs. Claiborne and Gholson were members of the 24th Congress. Their term of office expired with that Congress, which was on the 3d of March last. By the election laws of the State of Mississippi, it was provided that the general election for members of Congress, as well as other public functionaries, should take place at the times and places, and in the mode therein specified. The time fixed by that law for the election of representatives to the Congress of the United States was the first Monday in November biennially. Then the first Monday in the coming November would be the day it would have taken place, if it had not been for a state of things which was entirely unexpected. There would have been no necessity whatever for an extraordinary election to have taken place, had not the President deemed it proper to issue his proclamation convening Congress on the first Monday in September. The governor, seeing that the State of Mississippi would not be represented in the extra session of Congress, in virtue of the power he conceived conferred upon him, authorized an election to be held at an early day. The election was held in the month of July; but the governor, in issuing his proclamation and writs of election, limited the period for which these gentlemen were to be elected to the first Monday in November; and this question would come up as to how far he was authorized to do so. The governor had claimed this authority under that clause of the Constitution of the United States which had been referred to by the gentleman from Tennessee, which was, that "when vacancies happen in the representation of any State, the executive shall issue writs of election to fill such vacancies." Mr. P. contended that this was the plain and simple construction of the Constitution, and that it must be so construed. We must take the plain and simple meaning of words, and not place forced constructions upon them. In the very nature of things, all language must be defective; therefore we must endeavor to ascertain what was meant by those who made use of this language. It seemed to him, from the state of the facts given, and the literal meaning of words, that it was self-evident that such a vacancy had happened in this case as was contemplated by the Constitution. The office of representative was created by the Constitution of the United States, and was as much an office, and as much one created by the Constitution, as the office of judge of the Supreme Court, President or Vice-President of the United States, or any other office created under the Constitution. The tenure of that office was two years, and it expired on the third day of March, and consequently the office became vacant on the fourth day of March, and remained so until it was filled.

Mr. LEGARE, who was entitled to the floor, contended that if Messrs. Gholson and Claiborne were elected at all, they were elected members for the ensuing two years. This was clear, beyond all controversy. The election had been held and conducted throughout in the strictest conformity with the laws of the State of Mississippi. The writ had been issued in due time, the proclamation of the governor had been made precisely at the time it ought to have been; and the whole election was carried on throughout accordiug to law. The whole people of the State of Mississippi had been deeply interested in the contest: they attended the polls in full numbers, and decided the election of the gentlemen present by a very large majority. The question then was, whether this election, which was complete in all its parts,

exact in all its forms, and decisive beyond all controversy, was to be set aside as a mere nothing, the voice of a whole State stifled, and their representatives sent back. Mr. L. then quoted largely from "Binney on the Kentucky Election," and entered into a long argument to show that the election was strictly legal, and not at variance with the spirit and letter of the Constitution.

Mr. UNDERWOOD said that in reference to this particular election he could suggest a plausible reason why the present members should retain their seats—a reason which had not as yet been urged, and to which he confessed he should be puzzled to find an objection. It was this: The House of Representatives was composed of members chosen every second year, and the Constitution said that the States should regulate the manner and time of choosing them, unless Congress should interfere. The State of Mississippi had acted in accordance with this provision, and had elected her representatives to serve for the ensuing two years. The time of their election had not yet expired; and if they had been permitted to retain their seats to this period, in that view of the case, he would confess that if the objection were urged, he should be puzzled to set it aside. Under the letter of the Constitution there was nothing to prohibit it.

Mr. MASON, of Ohio, thought that if the governor of the State of Mississippi, with all his legal knowledge, both of the State law and that of the Constitution, was of opinion that the terms of election would expire with the present session, (and that was his opinion, he having inserted a clause in the writ to that effect,) then it would be a fair inference to suppose that the people of the State of Mississippi had a similar impression.

Mr. ADAMS said the question was not as to whether or not the vacancy had been filled, but whether it had been filled for the whole term of the present Congress. The law of the State of Mississippi made it clear, that although the governor had a right to issue his writ to fill the vacancy, it was only until superseded by the general election in November. He had no right to issue his writ for an election for the whole term, as was evident from the words, "until superseded," &c., which were added to the writ. These words had been inserted in conformity with the laws of that State, and had they been omitted, the governor would virtually have repealed the State law. But it might be taken for granted that a large portion of the people at the polls believed they were electing members for the whole term. Mr. A. went on to show that the present members could not retain their seats, unless re-elected the 1st of November, in conformity with the law of their State: but as they were here, he wished them to remain until the expiration of the present session, and then return home, when there would be no doubt of their being again chosen by the people.

The House voted, (October 3,) 118 yeas to 101 nays, that Messrs. GHOLSON and CLAIBORNE were duly elected members of the 25th Congress, and entitled to their seats. This, however, was not the end of the case. A congressional election was held in Mississippi in November, and Messrs. PRENTISS and WORD were returned to Congress, and they presented themselves with the usual credentials. Their memorial was referred to the Committee of Elections. They submitted a second report as follows:

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 12, 1838.

Mr. BUCHANAN, from the Committee of Elections, to whom the subject had been referred, made the following report:

The Committee of Elections, to whom was referred the communication of S. S. Prentiss and Thomas J. Word, claiming seats in this house as representatives from the State of Mississippi, report:

That, by the order of the House, they believe a special duty merely was imposed on them, to wit, to report the facts of the case; and therefore submit the following statement without comment or inference:

At the opening of the first session of the 25th Congress, on the 4th day of September, 1837, Messrs. Gholson and Claiborne appeared, were sworn, and took their seats in the House as members from the State of Mississippi. Before they were sworn, however, and before the House proceeded to an election of Speaker and Clerk, Mr. Mercer offered the following resolution, viz: "*Resolved,*

That sufficient evidence has not been afforded to this house that John F. H. Claiborne and Samuel J. Gholson are lawfully entitled to seats therein;" which resolution, after some debate thereon, was laid upon the table, on motion of Mr. Bynum.

On the 11th of September it was voted by the House that the action of the several standing committees, on all matters not embraced in the message of the President of the United States to the two houses of Congress, communicated on the second day of that session, be suspended until the commencement of the annual session in December.

On the 13th of September, on motion of Mr. Gholson, the foregoing order was suspended, so far as it relates to the action of the Committee of Elections.

On the 18th of September, in the House, on motion of Mr. Gholson, it was

Resolved, That the Committee of Elections be instructed to report upon the certificate of election of Messrs. Claiborne and Gholson, the members elect from Mississippi, whether they are members of the 25th Congress or not; and that said committee take into their consideration the proclamation of his excellency Charles Lynch, governor of said State, and the writ of election issued in accordance with said proclamation, on the 13th day of June, 1837; and also the act of the legislature of Mississippi, entitled 'An act to regulate elections,' approved March 2, 1833.

The only evidence or documents exhibited to the committee under the above resolution consisted of the law of Mississippi; the writ of election issued by the governor, requiring an election to be held in July last, for members of Congress for a limited term; (all of which are set forth in the report of the committee of last session, being document No. 2 of that session, to which the committee refer as part of their report;) and a certified statement of the votes given at that election, marked A.

Upon this evidence Messrs. Claiborne and Gholson, by a written argument submitted to the committee, and subsequently furnished to the members of the House, claimed to hold their seats in this house during the 25th Congress; and a majority of the committee thereupon made a report to the House, which concluded with the following resolution, viz:

Resolved, That Samuel J. Gholson and John F. H. Claiborne are duly elected members of the 25th Congress, and, as such, are entitled to their seats.

Which resolution, on the 3d day of October, was adopted by the House.

The proclamation of the secretary of the State of Mississippi, declaring the number of votes at the July elections, and that Messrs. Claiborne and Gholson were elected to "the called session of Congress," marked B; and the credentials, as required by the law of Mississippi, under the hand of the governor and the great seal of the State, declaring that Messrs. Gholson and Claiborne were duly elected to be members of Congress until the regular election should be had under the law of the State, in November next thereafter, although issued and in existence, were not presented to the committee at the last session, nor relied upon by Messrs. Gholson and Claiborne as any part of their evidence; nor considered by the committee in reaching the result to which they came in the resolution presented to the House. Inquiries, however, were made by a member or members in relation thereto. Answers were given; but by whom given, and of what import, are not now remembered with sufficient distinctness and unanimity to be incorporated with this report. The committee would add, however, that, differing as they did, essentially, in their views of the case, the production of the papers in question would not have changed the opinions which they formed on its merits.

The committee further report, that an election was held in Mississippi, according to the forms of law, on the first Monday and day following in November last, which resulted as per statement marked C.

They further report the credentials of Messrs. Prentiss and Word, as contained in document marked D.

The committee report document marked E, as the constitution of Mississippi.

The "statement marked C," shows that the contestants received several thousand majority in the November election. Their credentials were in the usual form. The facts in the case were correctly stated by Mr. Martin, in the House debate. They are as follows:

During the past summer, it was considered necessary by the President of the United States that the twenty-fifth Congress should convene its first session on the first Monday in September last, and for that purpose, by his proclamation, ordered Congress to meet upon that day. By the laws of Mississippi, the time fixed for the election of her members to the present Congress was the first Monday and day following in November last. The governor of that State, by his proclamation, ordered an election to be held in July, for the election of members to serve until superseded by those to be elected in November, the time fixed by law for holding the regular election. At the election in July, the sitting members were candidates, and were opposed by one of the applicants (Mr. Prentiss) and another gentleman, the result of which was their return by a large majority of all the votes cast. At the meeting of the session thus called, the sitting members presented themselves, and having participated in the election of Speaker, as is usual in such cases by all the members returned, were duly sworn and took their seats. Some question being made by the honorable gentleman from Virginia, (Mr. MERCER,) as to their right to seats as members, one of the sitting members (Mr. GHOLSON) called upon the House to institute an inquiry upon the subject, alleging, as his reason for doing so, that he wished the question settled in time for him to return to Mississippi, if he should be adjudged not entitled, before the time for holding the regular election in November, that the people might be informed, and hold another election. The House complied with that request, by the adoption of the resolution offered by that gentleman, referring the inquiry to the Committee of Elections, who, after examination, made their report, accompanied by a resolution, declaring the sitting members duly elected members of the twenty-fifth Congress; which resolution, so declaring, was, after full examination and discussion, adopted by this House.

In addition to the legal presumption that the adoption of this resolution was known to the people of Mississippi, that fact was made known to them through the newspapers, and other channels of communication, by the sitting members, so that before the election in November, the electors of that State were fully informed of the decision of the House, and of the determination of the sitting members to rely upon that decision. These facts are admitted on all sides of the House. The applicants alone were candidates at the November election, obtaining a majority of the votes cast for Congress, *but less than half of the whole vote polled at that election;* and that, too, after a general canvass through the counties of the State by the applicants, as stated by Mr. Prentiss. These, I believe, sir, are most of the important facts and circumstances upon which this application is founded. There are certainly no others that I have heard which tend in the slightest degree to strengthen the claims of the applicants.

Mr. GHOLSON also stated that—

His colleague and himself were not before the people at the November election, and they distinctly stated to the people, in a printed circular addressed to them, that they were not candidates upon that occasion. That circular was published, and it was announced, at least in all the democratic papers of the State, that they were not candidates. Mr. G. also wrote at least a hundred letters to his friends in different parts of the State, declaring that, in consequence of that decision, he was not a candidate.

Mr. G. further stated that, in twenty counties, where no votes were given for himself and his colleague in the November election, they received about five thousand votes at that of July; thus showing, conclusively, that there was no general turn-out of the people at the November election, induced, as he firmly believed, not to vote by the decision of the House. That was the main fact he wished to state. The House, by its vote, had said the election of July was void. Mr. G. was as well satisfied with that decision as any one else, but he wished them to vote, at least, with a knowledge of the facts.

In addition, Mr. G. had good grounds to know that the election in many other counties was partial, from the fact of his colleague and himself not being before the people, and therefore, by no kind of calculation, was the strength of parties tested in November. The people had been misled by the decision of the House.

After a somewhat lengthy debate, the House, (on January 31,) passed the following resolution—yeas 119, nays 112:

Resolved, That the resolution of this House of the 3d of October last, declaring that SAMUEL J. GHOLSON and JOHN F. H. CLAIBORNE were duly elected members of the 25th Congress, be rescinded, and that Messrs. GHOLSON and CLAIBORNE are not duly elected members of the 25th Congress.

On the 3d of February the House voted, 118 to 116, that Messrs. Prentiss and Word, the contestants, were not entitled to seats in the House, and the governor of Mississippi was notified that the seats were vacant.

NOTE.—The case will be found in proceedings and debates as follows: Vol. 5, Congressional Globe, pages 80, 82, 85, 86, 96; Appendix, pages 85, 91, 223, 130; Vol. 6, pages 56, 104, 119, 145, 146, 148, 150, 155, 158, and Appendix, pages 68, 93, 124, 127.

TWENTY-FIFTH CONGRESS, THIRD SESSION.

DOTY *vs.* JONES, *of Wisconsin Territory.*

The sitting member was elected delegate in the fall of 1836, and claimed the right to represent the Territory in Congress till the 4th of March, 1839, upon the ground that his term did not commence till the 4th of March, 1837, although he took his seat in 1836. In 1838 Mr. Jones was elected delegate to represent the Territory. The committee held that Mr. Doty was entitled to the seat, and the House sustained the decision.

The report in this case is as follows:

That, by the order of the House as submitted to them, the only question which presented itself was, whether or not the Territory was entitled to a representation by a delegate? In deciding this question the committee could have no difficulty, and might have absolved itself from further trouble by reporting an affirmative resolution. But believing the intention of the House, in making the order, to have been that the committee should examine the whole ground, and not only report as to the right of representation, but also designate the person who was the rightful representative, they proceeded to perform that duty, and report the following as the result of their investigation: By the act of 20th of April, 1836, which act was to take effect the 4th of July following, the Territory of Wisconsin was organized and the territorial government established; and by the 14th section of that act it was declared "that a delegate to the House of Representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as have been granted to the delegates of the several Territories of the United States to the said House of Representatives; the first election shall be held at such time and place or places, and be conducted in the same manner, as the governor shall appoint and direct; the person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given to the person so elected." By virtue and in pursuance of the said act of Congress, Henry Dodge, the governor of said Territory, (duly appointed,) issued a proclamation, dated the 9th of September, 1836, wherein, among other things, he orders and directs that the first election for members of the House of Representatives and council shall be held on the second Monday of October then next ensuing; and did also "direct and appoint that, at the same time and place specified for electing the members of said legislature, there shall be elected, by the voters of the several counties, one delegate to the Congress of the United States for the term of two years, agreeable to the 14th section of the act of Congress." In pursuance of said proclamation an election for a delegate in Congress was held, and George W. Jones was duly elected, as appears by the certificate of the governor, herewith reported, and marked A.

It appears by the journal of the House of Representatives, that on the 5th day of December, 1836, Mr. Jones appeared, was qualified, and took his seat in the House as a delegate from Wisconsin Territory.

From further evidence before the committee, it appears an election for a delegate to Congress for the Territory of Wisconsin was held on the 10th day of September, 1838, in conformity with the act of Congress and the laws of the

Territory, which resulted in the election of James Duane Doty, as appears by the certificate of the governor, herewith reported, and marked B.

No doubt exists as to the due election of Mr. Doty to serve as a delegate for a term of two years; but the question presented to the committee is this: When does his term of service commence? On the one side, it is contended that it commences with his election, or at least with the date of the governor's certificate of his election; on the other side, it is contended that the term for which Mr. Jones was elected in the fall of 1836 does not expire until the 4th of March, 1839; and in support of this view of the case, reference is made to the act of Congress of 3d March, 1817, the first and only section of which now in force is in the words following: "In every Territory of the United States in which a temporary government has been, or hereafter shall be, established, and which, by virtue of the ordinance of Congress of 13th July, 1787, or of any subsequent act of Congress, passed or to be passed, now hath, or hereafter shall have, the right to send a delegate to Congress, such delegate shall be elected every second year for the same term of two years, for which members of the House of Representatives of the United States are elected." Reference is also made to the act of 16th February, 1819, in which it is provided that the citizens of Michigan Territory be, and are thereby, authorized to elect one delegate to the Congress of the United States; that the person who shall receive the greatest number of votes at such election shall be furnished by the governor of said Territory with a certificate, setting forth that he is duly elected the delegate for the term of two years from the date of said certificate.

Under the act of 1819 Mr. Jones was elected a delegate for Michigan Territory, in October, 1835, and took his seat at the ensuing session, in December, 1835. By the act of June 15, 1836, the constitution and State government which the people of Michigan had formed for themselves was accepted, ratified, and confirmed, and she was declared to be one of the United States of America, and was admitted into the Union according to the boundaries therein prescribed, on condition that the boundaries so prescribed and established should receive the assent of a convention of delegates elected by the people of said State, for the sole purpose of giving the assent required; and as soon as said assent was given, the President of the United States was to announce the same by proclamation; and thereupon, and without any further proceeding on the part of Congress, the admission of said State into the Union shall be considered as complete. A convention of delegates, elected for the purpose expressed in the said act, was held, and gave their assent to the boundaries therein described, on the 15th of December, 1836.

The committee are of opinion that although in October, 1835, Mr. Jones was elected a delegate for Michigan Territory, to serve two years, yet, in the nature of the case, his term of service could not survive the existence of the corporation he was elected to serve. If the corporation of the Territory of Michigan was dissolved before the expiration of the two years for which he was elected, his office, as well as that of all other territorial officers, expired with it. It would seem to the committee that the Territory of Michigan, as a political corporation, was no more after the passage of the act of 15th June, 1836, organizing and erecting Michigan into a State; for, although there was a condition in that act, on compliance with which only she was to be admitted into the Union, yet that did not derogate from her character as a State, or prevent her from exercising all the powers of a State. Her being a State, and, as such, being admitted into the Union, are two different things. She might be a State, and was a State, exercising all the powers of a State under her own constitution, before she was admitted into the Union, and before the election in Wisconsin in October, 1836. At the time Mr. Jones was elected a delegate for Wisconsin Territory, in October, 1836, he was not a delegate for Michigan Territory, for the plain reason that no such Territory was in existence. In December, 1836,

he took his seat, and was sworn, as a delegate from Wisconsin, since which he has served two years—the full period allowed him by law. But it is alleged by Mr. Jones that under the act of 1817 a delegate must be elected only for one Congress, and not for parts of two congressional terms; that his term as a delegate from Wisconsin did not commence until the 4th of March, 1837, and consequently will not expire until the 4th of March, 1839. In this the committee do not concur with him, because it would have been leaving Wisconsin unrepresented for one whole session, contrary to the intention of the people as expressed in electing a delegate in October, 1836, in conformity with the privilege granted them for that purpose by the act of Congress of April, 1836; and because it does not follow, from the act of 1817, that a delegate from a Territory must be elected for and serve the same two years for which members from the States are elected; but (although this construction is not given with entire confidence in its correctness) the committee would construe the law to mean that delegates should be elected for the same length of time as representatives from the States. This construction is fortified by the fact, that previous to that law delegates were elected annually. Such construction will not clash with any provision of the Constitution, as delegates are so far the mere creatures of law that their term of service may be long or short, and may commence and terminate at such periods as Congress, in their wisdom, may direct. But if in this construction of the act of 1817 the committee should be in error, still their opinion would induce them to give Mr. Doty the seat, because, as the committee believe, that act has nothing to do with the present contest. It is nothing but an act of Congress, and, of course, subject to the control of subsequent legislation. It was controlled (if Mr. Jones's construction of it be right) by the act of 1819, which directed that the delegate of Michigan should serve two years from the date of the certificate of the governor, without regard to the commencement of his term, whether at the beginning or in the middle of a term of Congress. So would it be controlled by the act of 20th April, 1836, organizing the Territory of Wisconsin, which gives the power to its citizens to elect a delegate to represent them in Congress, without fixing any time for the commencement of his services; consequently, according to common construction in all such cases, where an obligation is imposed, or a duty to be performed, and no time fixed for discharging the obligation or performing the duty, it is to be done forthwith; and therefore the inference is, that Mr. Jones's duties as a delegate from Wisconsin commenced with his election in October, 1836, and terminated with Mr. Doty's election in 1838. The act of April, 1836, organizing the Territory, needs the aid of no other; it is perfect in itself, and would seem to be independent of all other acts.

On the whole, after all the consideration which the committee have been able to bestow on the subject, they have no hesitation in saying that considerable difficulty exists in reconciling the provisions of the different acts which may be supposed to have a bearing on the matter; yet they feel a great degree of confidence in two positions: first, that it was the intention of Congress, by the act of April, 1836, organizing the Territory, to afford the people of the Territory the privilege of an immediate representation in Congress by a delegate to be elected by themselves; and, second, that the people of the Territory acted with a view to the enjoyment of that privilege in electing a delegate in October, 1836. The conclusion would then seem to be, that Mr. Jones has served out the term for which he was elected in October, 1836, and that Mr. Doty is entitled to the seat under his election in 1838.

The committee submit the following resolution:

Resolved, That James Duane Doty is entitled to a seat in this house as a delegate from Wisconsin Territory, and that George W. Jones is not so entitled.

After a very brief discussion of the case, the House, by yeas 165, nays 25, agreed to the report of the committee.

TWENTY-SIXTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. CAMPBELL, South Carolina.
RIVES, Virginia.
FILLMORE, New York.
MEDILL, Ohio.
CRABBE, Alabama.
Mr. BROWN, Tennessee.
FISHER, North Carolina.
SMITH, Connecticut.
BOTTS, Virginia.

THE NEW JERSEY CASE.

In this well-known case the House, before it was organized, refused to admit claimants to seats who brought the governor's certificate of election. After organization the rival delegation was admitted to seats during the contest. Held by the committee, that hearsay declarations of the voter should be rejected. That *prima facie* it is to be taken that none but qualified votes have been received, and it is not sufficient that *a doubt* of their legality exists. Where it was alleged that the voter had not been naturalized, held that contestant must prove the allegation, even where the fact that the voter was *alien-born* was admitted. The disqualification of an officer, to affect the legality of an election, must be co-existent with the election.

The consideration of this case occupied a large portion of the first session of the twenty-sixth Congress. The organization of the House was delayed by it for two weeks. Two delegations presented themselves from five congressional districts in New Jersey—there being no controversy respecting one of the members. Messrs. Stratton, Maxwell, Halsted, Yorke, and Aycrigg offered the usual evidence of election—the certificate of the governor of New Jersey. Messrs. Kille, Ryall, Dickerson, Cooper, and Vroom presented themselves with the certificate of the secretary of state of New Jersey that *they* had received a majority of the votes cast in their respective districts. After a debate covering nearly two weeks the House (still unorganized) refused to permit either set of delegates to be recognized by the clerk as members. On the 13th of January the House, on motion of Mr. Campbell, of South Carolina, chairman of the Committee of Elections, agreed to the subjoined resolutions:

Resolved, That all papers or other testimony in possession of or within the control of this House, in relation to the late election in New Jersey for representatives in the twenty-sixth Congress of the United States, be referred to the Committee of Elections, with instructions to inquire and report who are entitled to occupy, as members of this house, the five contested seats from that State.

Resolved, That a copy of this resolution be served on John B. Aycrigg, John P. B. Maxwell, William Halsted, Charles C. Stratton, Thomas Jones Yorke, Peter D. Vroom, Philemon Dickerson, William R. Cooper, Daniel B. Ryall, and Joseph Kille, all citizens of New Jersey, claiming to be representatives from that State in this Congress, and that the service be made upon each gentleman personally, or by leaving a copy at his usual residence; and that said committee be authorized to send for persons and papers.

On the 28th of February, (1840,) the House instructed the committee "to report forthwith which five of the ten individuals claiming seats from the State of New Jersey received the greatest number of lawful votes from the whole State for representatives in the Congress of the United States at the election of 1838, in said State, with all the evidence of that fact in their possession: *Provided*, That nothing herein contained shall be so construed as to prevent or delay the action of said committee in taking testimony and deciding the said case upon the merits of the election."

The first report of the committee was submitted to the House March 5, 1840 After discussing the resolution of the House instructing the committee in reference to this case at considerable length, the committee proceed as follows:

With this explanation, which they have considered due to the House and to themselves, the committee will now proceed to examine the allegations against the validity of certain township elections, as far as such an examination can be made upon the testimony in their possession.

Upon this branch of the case the claimants holding the governor's commissions claim—

1st. That, *apart from their not being received in time to be counted according to law, the votes of Millville should be set aside for the fraudulent and illegal conduct of the officers of election, in proclaiming their intention to receive the votes of aliens, and in receiving a large number of such knowingly, and in violation of the laws of the State.*

Without inquiring into the effect of these charges, if they were substantiated by competent and satisfactory testimony, it is sufficient to state that they are unsupported by any testimony in the possession of the committee.

2d. They allege that, *apart from all defects and irregularities in the return, the votes of South Amboy should be set aside, because one of the officers of election duly chosen was unlawfully prevented from acting, and another substituted in his place, who acted and signed the list, &c.; and because the board, thus unlawfully constituted, received a large number of alien votes contrary to law.*

In support of these allegations, numerous depositions have been produced, but without expressing an opinion, whether, if satisfactorily proved, they would constitute sufficient evidence of fraud to set aside the votes of this township, it is only necessary to state that the evidence was taken *ex parte*, without sufficient notice, and has been rejected by the committee as incompetent to be considered in this case.

3d. It is further claimed, that the poll held at Saddle River, in Bergen county, should be set aside: because *at least eight votes given for them were fraudulently abstracted from the ballot-box, and as many for their opponents fraudulently substituted:* because, *in making out the list of votes in said township at least eight votes less than were given for them were counted in their favor, and at least as many were counted for their opponents, more than they received;* and because *the list of votes in said township bears upon its face evidence of mistake or fraud.*

In support of these charges, the depositions of numerous voters have been submitted; but, being taken *ex parte*, and without sufficient notice, they have been rejected by the committee as incompetent testimony.

It is also claimed that the polls held at the townships of Newton, Harderton, and Vernon, in Sussex county, should be set aside, for reasons that will more fully appear by reference to the document marked A, accompanying this report. But there is no competent evidence before the committee in support of these allegations.

Having thus disposed, for the present, of the various objections to the validity of the elections held at the several townships claimed to be set aside, the committee will now proceed to ascertain "which five of the ten claimants received the greatest number of lawful votes" at the late congressional election in New Jersey, according to the several returns purporting upon their face to be made by officers duly authorized to act.

The committee take as the basis of their calculation the statement upon which the governor and privy council of New Jersey made their decision, and which is found in the minutes of the proceedings of the governor and privy council. From this statement it appears that the total of votes for each of the ten claimants was as follows: For Philemon Dickerson, 27,951; Peter D.

Vroom, 27,990; Danial B. Ryall, 27,939; William R. Cooper, 27,954; Joseph Kille, 27,924. For John B. Aycrigg, 28,150; John B. P. Maxwell, 28,239; William Halsted, 28,192; Charles C. Stratton, 28,252; Thomas Jones Yorke, 28,177. For Philemon *Dickinson*, 3. For John B. *Acrigg*, 1.

[The report then goes on to declare that this statement does not include the votes received at the townships of Millville and South Amboy. The vote of the two sets of claimants in these townships the report alleges was as follows: For Messrs. Dickerson, 502; Vroom, 502; Ryall, 502; Cooper, 501; Kille, 502. For Messrs. Aycrigg, 144; Maxwell, 144; Halsted, 145; Stratton, 144; Yorke, 144. The report closes as follows:]

Thus it appears that *prima facie* upon the evidence in the possession of the committee, Philemon Dickerson, Peter D. Vroom, Daniel B. Ryall, William R. Cooper, and Joseph Kille, are the "*five of the ten individuals claiming seats from the State of New Jersey*" who "*received* the greatest number of lawful votes from the whole State for representatives in the Congress of the United States at the election of 1838 in said State."

The minority report sets out with the subjoined statement of the case:

"The commissioned members claimed the vacant seats under and by virtue of the commissions issued by the executive of New Jersey; and insisted that if the committee should determine to go back of those commissions, and to inquire into the merits of the election, they had a majority of the legal votes polled, and also a majority of the votes lawfully certified to the governor.

"The non-commissioned claimants admitted the authenticity of the commissions, but alleged that they received the greatest number of votes polled; that the governor and privy council unlawfully refused to count the votes from the townships of Millville and South Amboy, for the reason that they were not included in the certificates of the clerk of the counties of Middlesex and Cumberland; and that, had the votes of these townships been counted, the result would have been a majority in their favor. That the commissions being thus erroneously and unlawfully issued, were void.

"The commissioned members alleged numerous frauds and illegalities in the election; some of which they insisted ought to set aside the polls; and others invalidate the votes; such as excluding duly elected persons from officiating as judges of election; the determination of electing officers to receive alien votes, and, in fact, receiving such votes, knowing that they were illegal; disregarding all challenges of illegal votes, and permitting persons, attempting to challenge, to be driven away by threats and violence; and fraudulently abstracting votes given for them, and substituting others for their opponents, and rejecting legal votes offered for them, and admitting illegal votes on the other side; and they also submitted to the committee a list showing about 230 illegal votes given and counted for the non-commissioned claimants, and three or four legal votes offered for the commissioned members and rejected. They also alleged that they expected to prove an extensive conspiracy among the friends of the opposite set of claimants, to perpetrate these frauds and obtain these illegal votes; that they had taken some evidence to establish said fact, but had been prevented from completing the proofs, because there was no law regulating the mode in which the same should be obtained, or giving compulsory process to compel the attendance of witnesses; and also because the friends of the non-commissioned claimants had persuaded witnesses not to attend for examination, and had prevented officers from taking depositions by intimidation and threats of public prosecution for so doing; and they asked further time, and the authority and direction of the committee, to enable them to compel the taking of their testimony.

"The non-commissioned claimants denied all knowledge of the alleged frauds and illegal votes, but stated that they had heard of some alien votes having been given at Millville, and admitted the fact; and also presumed that alien votes were given in other parts of the State; but believed that there were as many on the one side as on the other."

[The minority of the committee objected strenuously to the making of a report while the parties concerned were still taking testimony, and the committee had not completed its investigation. They say:]

"A majority of the committee, paying no regard to absolute instructions of the House, *to report the* LAWFUL *votes*, decided that the introduction of the word '*lawful*' did not affect the original meaning of the proposition, and that the resistance it had encountered in the House from four of their own members had no object in it but a perverse and obstinate determination on their part to oppose a perfectly harmless amendment; and they proceeded at once, without deigning to go into an examination of the testimony before them, to make a report on the whole number of votes given at the polls, lawful and unlawful, the men and the boys, the aliens and the citizens, without discrimination, and without stopping to inquire whether the elections were held in the manner prescribed by law, when they knew that allegations had been made and partially established; that all these matters would be proven, and many of them, perhaps enough, already proven by the testimony then before them to change the result, at least in part, if they would have opened and examined it. But this, the committee conclude, and labor throughout their report to prove, they were not authorized to do, because they were directed to report *forthwith* on the *lawful* votes, and that the effect of that omnipotent and *pungent word* '*forthwith*' neutralized and nullified the word *lawful*, and rendered it perfectly nugatory; and that being required to report forthwith *the lawful votes*, they were of necessity compelled to regard all unlawful votes as lawful votes, and that that was what the House intended when, by a vote of 97 to 96, they determined to insert it."

On the 16th of March, by a vote of 111 to 80, the House declared that Messrs. Dickerson, Vroom, Kille, Ryall, and Cooper, were entitled to seats from New Jersey as members of the twenty-sixth Congress, but that this decision shall not affect the rights of the other claimants to continue the investigation or contest.

On July 8, 1840, the Committee of Elections submitted a final report, which is as follows:

The Committee of Elections, to whom was referred the case of the contested election from the State of New Jersey, report:

That at the opening of the House of Representatives of the present Congress, Joseph F. Randolph, John B. Aycrigg, John P. B. Maxwell, William Halsted, Charles C. Stratton, and Thomas Jones Yorke, presented themselves with the usual credentials from the executive authority of New Jersey, and claimed to be the lawful representatives of the people of that State.

To the right of Joseph F. Randolph there was no opposition, and he was admitted to a seat. But, simultaneously with the appearance of Messrs. Aycrigg, Maxwell, Halsted, Stratton, and Yorke, five other gentlemen, to wit, Peter D. Vroom, Philemon Dickerson, Joseph Kille, William R. Cooper, and Daniel B. Ryall, presented themselves, and offered evidence to show that they had received the greatest number of votes from the whole State, and were entitled to the returns.

The House of Representatives refused to admit either party of these ten claimants in its organization, and on the 13th of January adopted the following resolutions:

On motion of Mr. Campbell, of South Carolina,

Resolved, That all papers, or other testimony, in possession of or within the control of this House, in relation to the late election in New Jersey for representatives in the 26th Congress of the United States, be referred to the Committee of Elections, with instructions to inquire and report who are entitled to occupy, as members of this House, the five contested seats from that State; and that the committee have power to send for persons and papers.

Resolved, That a copy of this resolution be served on John B. Aycrigg, John P. B. Maxwell, William Halsted, Charles C. Stratton, Thomas Jones Yorke, Peter D. Vroom, Philemon Dickerson, William R. Cooper, Daniel B. Ryall, and Joseph Kille, all citizens of New Jersey, claiming to be representatives from that State.

On the next day, the 14th January, the committee assembled; and for its proceedings from that time to the 3d of March, reference is made to the printed journal, in report No. 506 of the present session.

By that report it appears that the credentials held by J. B. Aycrigg, J. P. B. Maxwell, William Halsted, Charles C. Stratton, and Thomas Jones Yorke, were based on an imperfect canvass, not embracing the whole number of votes received in the State, but that the votes of two townships, to wit, Millville and South Amboy, had not been included in such canvass.

By the adoption of that report, the House made substantially a correction of the returns, and awarded the seats to Peter D. Vroom, Philemon Dickerson, Daniel B. Ryall, Joseph Kille, and William R. Cooper, with a proviso that nothing contained in the resolution should be so construed as to prevent the investigation into the election from being continued in the manner heretofore authorized by the committee, on the application of the claimants.

Thus it is evident that, notwithstanding the admission of the five claimants last named to seats, the proceedings of the committee, and of the parties, in regard to the ultimate merits of the election, were not affected; and on the 16th day of April the parties reappeared before the committee with a mass of testimony, the result of a canvass extending over the whole State. This testimony, taken under the agreement of the parties (see Exhibit N) and the law, relates to nearly six hundred distinct cases of votes polled for one party or the other, alleged to be unlawful, and of votes alleged to have been improperly refused at the polls. Besides these cases, there were also involved the question of legality of the poll holden at South Amboy, and the allegation of fraudulent practices by the officers of the election at Saddle river.

In the hope that the grounds of the controversy might be more strictly defined and narrowed, and that the testimony scattered through so many separate depositions bearing on the same points, might be so arranged and collected as to facilitate the labors of the committee, while it should insure the ends of justice, the testimony in the possession of the committee was, on the 16th day of April, by the mutual agreement of the parties, delivered into their hands, and the committee continued the investigation of other cases pending before them.

Although, from this arrangement, much greater delay ensued than the committee anticipated, the subsequent investigation proved that, without the assistance of the parties, the difficulties of the investigation would have been almost insurmountable; testimony in relation to the same vote being often found to have been taken not only from many different witnesses, but at various and distant times and places, to which no clue would else have been furnished.

Nevertheless, impatient of delay, the committee passed resolutions calling on the parties on the 13th and 20th May, and, finally, on the 2d June.

The committee having previously, under the power granted by the House,

ordered the papers to be printed, the final investigation was commenced on the 3d June, with a volume of evidence of nearly 700 printed pages.

From that day until this, the journal of the committee, herewith reported, will evince the magnitude of the task to which they have been devoted.

The most minute and tedious course has been adopted. The case of every individual vote has been treated as a distinct controversy. The testimony relating to it having been first read, arguments upon the facts or law, or both, were heard from parties, frequently followed by elaborate discussion in the committee itself. The question was then put upon a formal resolution, devised with reference to the *prima facie* legality of the proceeding at the polls and the burden of proof; which resolution, as applied to each case, with the yeas and nays thereupon, will be found in the journal. As applied to alleged unlawful votes, it presents two affirmative propositions: 1st, that the vote in question was not a lawful vote; and, 2d, that it be deducted from the votes of one or the other of the parties. The first proposition involved the inquiry whether the vote was actually cast at the polls; and, for the ascertainment of this point, the committee necessarily resorted to parol proof, as the best evidence which the nature of the case would admit of; the laws of New Jersey not requiring the poll-lists to be preserved as a record of the actual voters. Mere hearsay declarations of the alleged voter, as to the fact of his having voted, have been uniformly rejected.

The fact of the voting being ascertained, the alleged disqualification, as a question of law and fact, was considered. With reference to their disqualification, the impeached voters may be divided into divers classes, to wit: aliens, non-residents of the county, non-residents, minors, men of color, persons *non compos mentis*, and persons not possessed of the requisite property qualification.

In examining the various alleged grounds of disqualification, the principal differences of opinion in the committee arose from the constantly varying facts of each case, (which operated variously upon the minds of different members,) and upon the sufficiency of the evidence to establish the result.

The most serious of these differences of opinion arose in the consideration of the first-named class of impeached voters, to wit, aliens. A minority of the committee were of opinion that it was sufficient for the party objecting to the vote to prove that the voter was *alien born;* and that the burden of proof was thereby thrown upon the party for whom the vote had been rendered at the poll, to prove that the voter had been naturalized. And it was urged, with great earnestness, that to adopt any other rule of evidence would be to depart from the plainest principles of law and reason—to impose upon the party objecting to a vote the proof of a negative; and a negative, too, which nothing short of searching of every *court of record having common-law jurisdiction, a clerk, and seal,* in the Union, could possibly establish.

Without minutely criticising the argument, it is deemed proper to inquire to what practical consequences the rule would lead, if it be fully admitted; for the proposition is to be taken, not as a mere abstract annunciation of the order of proof, but as practically applicable to the decision of cases of contested election in the House of Representatives.

The committee, as the organ of the House, have a positive affirmative proposition to adjudge and declare, before a sitting member can be displaced, or a single vote received for him at the polls can be ejected from the ballot-box. Before a member is admitted to a seat in the House, something like the judgment of a court of competent jurisdiction has been pronounced upon the right of each voter whose vote has been received; and in order to overturn this judgment, it must be ascertained affirmatively that the judgment was erroneous. *Prima facie,* it is to be taken that none

but the votes of qualified voters have been received by officers whose sworn duty it was to reject all others. This principle will be found to have been solemnly and unanimously declared by the committee as a basis of future action soon after entering upon the investigation of this case. (See report No. 506, page 46.)

It is not sufficient that there should exist a doubt as to whether the vote is lawful or not; but conviction of its illegality should be reached, to the exclusion of all reasonable doubt, before the committee are authorized to deduct it from the party for whom it was received at the polls.

Will the mere naked fact that a voter was alien born, in the absence of all other proof, produce such conviction on any candid mind? Is it not already answered, or, rather, is not even a presumption from that fact alone precluded, by the judgment at the polls? All foreigners from birth are not disqualified from voting, but only a certain class. Are we to presume the voter, whose vote has been received by the officers of the election, to be of the disqualified or the qualified class? The question is answered by the unanimous resolution of the committee already referred to, as well as by the reason and analogy of the case.

The committee cannot believe that the House of Representatives would eject a member from his seat upon the mere proof that every man of his constituents was *alien born*. It is not apprehended that, after an election has been regularly held, the House would even consider an investigation necessary upon a petition which alleged no other fact.

The history and statistics of the country preclude the principle insisted on by the minority of the committee as a rule of evidence applicable to cases of contested election. Our institutions acknowledge no difference between the native-born and naturalized citizen in the enjoyment of the elective franchise. While the spirit of our laws continues to receive, with such enlarged and gracious beneficence, the stranger and exile from every clime; while the Genius of Liberty stands, with wide-spread arms, attending the term of their short and easy novitiate, to absolve them from all alien bonds, and to administer the sacred rights of their political regeneration; surely the fact of foreign birth alone cannot suffice to annul a right which has been affirmed by a tribunal having the amplest power and means to test it, and exercising that power under the requirements of law and the solemn sanctions of an oath.

But it may be asked, Does not the presumption originally arising from the fact of foreign birth acquire additional strength; and may it not overturn the decision at the polls, when neither the voter, nor the party claiming the benefit of his vote before the committee, adduces here any evidence of his naturalization? If the voter refuses to testify to his own disqualification, (as he legally may,) how can the party impeaching his vote proceed further in the proof of his allegation? Shall he be put to the proof of a negative? Is not the voter a party to the proceeding; and is not his neglect to rebut the proof of his birth by the evidence of his naturalization conclusive against him?

Undoubtedly, if the voter be, to all intents and purposes, a party to this proceeding, claiming to exercise a right here, such would be the conclusion; and, unless he should make out his right affirmatively, he must fail to establish it. So it was at the election; and so it would be here, if the committee were holding a poll. But such is not the vocation of the committee or the House. If it were, the mere reference of the petition, the mere creation of a controversy, would annul all that has been done at the election. Then, indeed, things would be taken up and treated *de novo;* voters, who had once maintained their right, and exercised it at the polls,

would be required to come forward and submit themselves to another challenge, and a new affirmation of their franchise.

Again: if the voter is, to all intents and purposes, a party to the proceeding before the House or its committee, how is it that he is admitted to testify as a witness? Why are not all his declarations or admissions, wheresoever and howsoever made, in relation to the subject-matter of the controversy, the best evidence when proved by a competent witness? The distinction between the controversy at the polls and that before the committee is manifest. At the polls, the voter is a party. When the polls are closed, and an election is made, the right of the party elected is complete. He is entitled to the returns; and when he is admitted to his seat, there is no known principle by which he can be ejected, except upon the affirmative proof of a defect in his title. Whoever seeks to oust him, must accomplish it by proving a case. The difficulties in his path can form no possible reason why the committee should meet him half way. The rule of reason requires that he should fully make out his case, even though it involve the proof of a negative; and such is also the rule of Parliament in analogous cases. (See 3d Douglas, 219.)

In Rogers's Law and Practice of Election Committees, page 116, it is said: "So in cases of petitions against candidates on the ground of want of sufficient qualification: although a negative is to be proved, it is the usage of Parliament that the party attacking the qualification is bound to disprove it."

It may be added, that this rule has been applied by the committee, without controversy, to every other species of alleged disqualification. In the cases of aliens alone was a different rule contended for. Adhering to the rule, the committee have uniformly required something more than the mere affirmative proof of foreign birth; the disqualification not being foreign birth, but the actual state of alienage at the time of voting.

The great number of cases in which the disqualification has been fully made out, and the votes deducted from the one party or the other, sufficiently answer the objection which has been supposed to arise from the alleged impossibility of proving the negative. In none of these instances were the parties put to the necessity of searching every "court of record having common-law jurisdiction, and a clerk, and seal, in the Union." In some cases the voters themselves have declared, under oath, that they were never naturalized; in others, while asserting their naturalization, they have stated circumstances inconsistent with it. In short, an infinite variety of circumstances, which will be found in the evidence, joined with the fact of foreign birth, have completely proven the disqualification in a great number of cases.

On the other hand, the hardship of requiring the sitting member, upon the mere proof of foreign birth, to produce before the committee evidence of the naturalization of hundreds or thousands of persons over whom he has no control, and who, by withholding that proof, may vacate his election, must readily be admitted. The proper season to demand such proof is at the polls. There the voter is the *actor;* he comes forward claiming to exercise a right, and there he should prove his qualification. Where the case assumes the form of a contested election between other parties, the disqualification must be made out by the party seeking to overthrow the right of the sitting member thus acquired at the polls.

But it is not upon the sitting members alone, in this case, that the rule contended for would have hardly operated. Had it been adopted and applied, it must have led inevitably, in particular instances, to the virtual disqualification of men who had lived long enough among us to have seen several generations spring into existence, and who had well and faithfully served the State in war and in peace,

Many of these principles being equally applicable to the other grounds of dis-

qualification, it will not be necessary to do more than briefly notice the remaining classes.

2. Non-residents.

The law of New Jersey (act June, 1820, sec. 4, 1 Laws New Jersey, 741) requires that the voter should have "resided in the county where he claims a vote, for at least one year immediately preceding the election;" and (*ib.*, sec. 7) that he shall not "be permitted to vote" "only in the township where he usually resides." No term of residence in the township is prescribed; and all that has been required by the committee is, that the voter should have an actual *bona fide* residence in the township where his vote was received.

Upon these questions of residence, both in county and township, the committee have endeavored to apply the well-settled principles of law; and the differences of opinion have rarely, if ever, extended beyond the question of the effect of the various facts as proving or disproving the coincidence of fact and intention.

As to minors, nothing need be said, further than to cite the law. (Act June, 1820, sec. 4.)

Of men of color, there were two voters whose votes were deducted; (act June, 1820, sec. 4;) one on each side.

Persons *non compos mentis* are not expressly disqualified by the terms of the law; but the committee entertained the allegation in a single instance, from the general reason and nature of the case. Questions of sanity, however, being of the most delicate and difficult which arise in the courts, the committee could not consent to disqualify a voter on this ground, except upon the most distinct and indubitable proof; and none such being adduced, his vote was not disturbed.

The remaining ground of disqualification seems to demand more particular notice.

The fundamental law, or *quasi* constitution, of the State of New Jersey, passed in Provincial Congress of New Jersey, July 2, 1776, (1 Laws N. J., p. 4,) requires, among other things, (sec. 4,) that the voter shall be "worth £50 proclamation money, clear estate, within the colony."

By the 4th section of the act of June, 1820, (1 Laws N. J., 741,) the same property qualification is expressly re-enacted.

By the 5th and 6th sections of the same law, it is enacted as follows:

SEC. 5. That every person who shall in other respects be entitled to a vote, and who shall have paid a tax for the use of the county or the State, and whose name shall be enrolled on any duplicate list of the last State or county tax, shall be adjudged by the officers conducting the election to be worth £50, money aforesaid, clear estate.

SEC. 6. That no person shall hereafter be deemed by the officers conducting the election to be a qualified voter, in respect of estate, who has not either paid a tax, or whose name is not enrolled on the duplicate as aforesaid, except in the cases of persons who may have arrived at the age of twenty-one years since, &c.

Without attempting, in this place, to criticise minutely the respective provisions of these laws, it may be sufficient to state, that they seem at least to confine the right of suffrage, in all cases, to *bona fide* taxable citizens, in other respects duly qualified. When, therefore, it has appeared that previous to and at the time of voting the voter has received support from the town as a pauper, and has not paid a tax, the committee have not considered him a "*qualified voter in respect of estate.*" So, also, where a person of that class was brought to the polls, and a tax there paid for him by another, on condition that he should vote a certain ticket, the committee did not consider the former a *bona fide* tax-payer, and his vote was deducted.

With these general remarks as to the several classes of disqualified voters, and the course of the committee in the ascertainment of the disqualification, it may be sufficient to pass to the subject of the appropriation of the votes.

It being satisfactorily ascertained that an unlawful vote was counted at that

whereon, the next inquiry which arose was as to the party for whom it was cast at the polls.

The elections in New Jersey are by ballot; and it will readily be perceived that this inquiry was not without serious difficulties.

Although, in numerous instances, the voter, being examined as a witness, voluntarily disclosed the character of his vote, yet, in many cases, he either did not appear, or, appearing, chose to avail himself of his legal right to refuse an answer on that point. In such cases the proof of general reputation as to the political character of the voter, and as to the party to which he belonged at the time of the election, has been considered sufficiently demonstrative of the complexion of his vote. Where no such proof was adduced on either side, proof of the declarations of the voter has been received; the date and all the circumstances of such declarations being considered as connecting themselves with the questions of credibility and sufficiency. In every instance where the proof, under all the circumstances, was not sufficient to produce conviction, the vote has been left unappropriated.

The same principles have governed the committee in regard to the votes decided to have been improperly rejected at the polls. Whatever doubt might have existed as to the propriety of adding these votes to the respective polls, the addition in this case was, as is recited in the preamble to the resolution adopted by the committee on the 11th instant, with the concurrence of parties on both sides in attendance, as to the propriety of so doing. Of these votes, sixteen were added to the votes for P. D. Vroom and his associates, and six to the votes for the opposite party.

It only remains to notice the objections made to the validity of the election at South Amboy, and the allegation of fraudulent practices by the officers of the election at Saddle river.

The objections to the election in those two townships will be considered in the order in which they are named.

For himself and associates, "Mr. Halsted objects to the election held in the township of South Amboy, in the county of Middlesex, because the said election was held by judges who were not chosen according to law;

"And because John B. Appelget, who had been duly chosen inspector of said election, according to law, to supply the place of Clarkson Brown, who was disqualified, was not permitted to act as inspector at said election in said township;

"And because James M. Warne acted as inspector of said election in said township, without having been duly elected inspector according to law;

"And because there was no certificate of the election of the said James M. Warne, inspector, signed by three reputable freeholders, transmitted to the clerk of the common pleas of the county of Middlesex within the time prescribed by law;

"And because the judge of the election in said township of South Amboy knowingly received illegal votes;

"And because the said judges of said election did not conduct the said election in said township according to law."

After having heard and considered the testimony in support of the above allegations, the committee unanimously resolved "that there did not appear any sufficient reason for setting aside the election in South Amboy."

In New Jersey the election is conducted in each township by a judge, and the assessor and collector of the township, who are *ex officio* inspectors of election; and the law prescribes that "if the judge, assessor, and collector, or either of them, shall not be present at the time and place of holding the election, or shall be disqualified to hold the same, then, at the hour of ten o'clock, the people present entitled to vote shall proceed to choose a person or persons to serve in the place of him or them so absent or disqualified."—(See Revised Laws of New Jersey, page 274.)

appears, by the testimony upon this subject, that one of the inspectors of election at South Amboy became disqualified to act, by reason of being a lidate for the State legislature; and that, to supply this vacancy, three per- were placed in nomination, to wit: John B. Appelget, James M. Warne, J. V. Gordon.

the testimony of Timothy Wood and Phineas Mundy, the tellers appointed unt the votes; of Nathaniel Hillyer, the judge of the election, who an- ced the result; and of several other witnesses, who had the best opportu- of knowing what actually took place, is to be believed, there cannot be a t that the election of James M. Warne as inspector was substantially in ormity with law. (See printed testimony accompanying this report, from 500 to 514, both inclusive.)

on the contrary, the testimony of Charles Fish, of Thomas Appelget, of n Seward, of Jacob Herbert, and of John B. Appelget, stood uncontradicted, conclusion would be irresistible that great irregularity had prevailed in the tion of inspector. (See pages 543, 544, 545, 549, 621, 622, of this report.) o contrast this testimony, however, with that of those previously referred mong whom were all the officers of the election, whose official duty it was now what had actually taken place, it is impossible, without imputing de- rate perjury to one set of deponents or the other, to come to any other con- ion than that the last-named witnesses spoke from mistaken impressions, not kely to occur in the tumult and confusion of an excited popular election, lucted neither *viva voce* nor by ballot, but by the friends of the respective ies dividing in different directions, as indicated by the various points of the pass.

the positive testimony upon this subject left any doubt, circumstantial evi- e, derived from the disproportion between the parties, might be resorted to orroboration of the conclusion to which the committee have come.

n the election for Congress, held immediately after the election for inspector, highest number of votes received by any gentleman of Mr. Appelget's party but 45; while the lowest number received for any candidate of the party hich Mr. Warne was a member was 295. The last-named witnesses rep- nt Appelget to have been elected inspector by a majority of about three to

If they are not mistaken, the extraordinary circumstance has occurred, , at a period of great party excitement, the candidate of a party, bearing the tive proportion of less than one to six to the other, has been elected, over combined strength of his opponents, by a majority of about three to one.

The committee, however, feel no necessity for resorting to circumstantial lence in support of their opinion "that the contestants have failed to estab- their first allegation," to wit: "*That the election at South Amboy, in the nty of Middlesex, was held by officers not chosen according to law.*"

The second allegation necessarily falls with the first.

The third allegation, to wit: "*That there was no certificate of the election James M. Warne, inspector, signed by three reputable freeholders, transmitted he clerk of the common pleas of the county of Middlesex within the time pre- bed by law,*" although proved, is believed by the committee to be entirely lequate to affect the validity of an election legally held. Surely it cannot that one of the dearest rights of Jerseymen—a right which, more than any er, distinguishes the citizens of a representative government from the sub- s of a despot—is to be trampled in the dust, *because, forsooth, there was no ificate of the election of James M. Warne, inspector, signed by three repu- le freeholders, transmitted to the clerk of common pleas of the county of Mid- ex within three days thereafter!* Whatever pretext such an omission may e afforded to the clerk of the county of Middlesex for the perpetration of a ing outrage upon the rights of his fellow-citizens, in suppressing the votes ed at South Amboy, in the return transmitted by him to the governor, it can-

not affect the legality of the election. It was not necessary that a certificate of the election of the inspector should have been transmitted to the clerk of common pleas, either before or during the election; and the omission to do so afterwards cannot have a retrospective effect to defeat the will of the people, expressed in conformity with law. The disqualification of an officer, to affect the legality of an election, must evidently be co-existent with the election.

The fourth and fifth allegations are, in substance, *that the judges of the election knowingly received illegal votes, and did not conduct the election according to law.*

Illegal votes were proved before the committee to have been received for both parties at South Amboy, of which the poll has been purged by the committee; but, so far as intention was concerned, it appears, by the evidence, that the election was fairly, honestly, and legally conducted; and the proof is insufficient to establish the fact that a single illegal vote was knowingly received.

Mr. Halsted and associates also claim to *set aside the poll held at the township of Saddle river, in the county of Bergen, because eight votes, at least, given for them by persons legally entitled to vote, were fraudulently abstracted from the ballot-box, and at least as many for their opponents substituted in their place; because, in making out the list of votes in said township, at least eight votes less than were actually given for them were counted in their favor, and at least as many were counted for their opponents more than they actually received; and because the list of votes of said township shows upon its face evidence of mistake or fraud.*

In support of these allegations, the depositions of 31 voters are produced, each one of whom swears that he voted the whig ticket; and, by the deposition of the clerk of the election, it appears that one other, who was not sworn in person, voted the same ticket; making, in all, 32 votes. (See testimony accompanying this report, from page 424 to 446, inclusive.)

They also show that the officers of the election at Saddle river returned but 24 votes for them, leaving 8 votes to be accounted for; and that 127 votes in all were returned, when it appears that there should have been but 126.

On the part of Messrs. Vroom and associates, it is contended that the election at Saddle river was fairly and legally conducted; that the ballot-box was so secured that it was impossible for it to have been violated without discovery; or for tickets to be put into or taken out of it without the knowledge of the officers of the election. (See pages 443, 446, 447, and 448, of this report.)

They endeavor to account for eight votes less being enumerated for Messrs. Aycrigg and associates than it is alleged they have received, by showing that a double whig ticket, folded together, was rejected from the count by the officers, as the law requires; that the name of one of the deponents, who swears that he voted the whig ticket, by the testimony of the clerk of the election does not appear on the poll-list. They also show, by positive proof, that another of these deponents voted the democratic ticket; and, from circumstantial evidence, endeavor to show that five others of them voted the same; leaving the discrepancy between the number of votes received by both parties, and the whole number of votes as returned, unaccounted for, except by supposing that the clerk of the election may have omitted to have recorded the name of one of the voters on the poll-list, or that two votes may have been thrown in by one person, in such a way as to conceal the act. (See testimony accompanying this report, pages 432, 433, 437, 441, 443, 461, 464, 467, and 468.)

Although the testimony above referred to is by no means conclusive as to every vote attempted to be accounted for, the committee are so well convinced, from the evidence, that the election was fairly and legally conducted, and that no fraud was perpetrated on the ballot-box, that they have determined to take the return of the officers of the election as the best evidence produced, and to sustain the legality of the Saddle river poll.

[The report here sums up the legal votes cast, giving to each sitting member a clear majority. It continues:]

The committee do not think it necessary to comment upon the extraordinary transactions which occurred in New Jersey shortly after the closing of the polls, and from which, it is believed, all the difficulties of this case originated, further than to say, that, in suppressing the votes of Millville and South Amboy, the clerks of Middlesex and Cumberland were guilty of a gross violation of the elective franchise, calculated virtually to deprive the people of one of their dearest rights, and to keep from this house a knowledge of those facts by which alone it can judge of the election of its members. The duties of those clerks as returning officers were strictly ministerial; and when, instead of making a faithful record of the people's will, as expressed at the polls, and transmitting those records to the governor, or person administering the laws of the State, they undertook to decide upon the legality of the polls, and to act in accordance with those decisions, they exercised an unauthorized power, which, for more than three months, silenced the voices of five out of the six members to which New Jersey was entitled in the House of Representatives; and for which their conduct, whether proceeding from ignorance or design, must meet with the unqualified disapprobation of the honest and intelligent of every party.

And concludes:

Thus it appears that the result of this investigation has been to increase the majority of the five claimants who received the greatest number of votes from the whole State; and the committee recommend the adoption of the following resolution:

Resolved, That Peter D. Vroom, Philemon Dickerson, William R. Cooper, Daniel B. Ryall, and Joseph Kille are entitled to occupy, as members of the House of Representatives, the five contested seats from the State of New Jersey.

The minority report recommended no specific action, though it claimed that three of the contestants received a majority of the legal votes cast. The minority argue as follows upon one contested point:

But we now desire to call the particular attention of the House to the all-controlling principle which pervaded the deliberations of the committee, and which was ingeniously adapted to favor the "foregone conclusion" that the opposition claimants are not entitled to the contested seats. The House will recollect the position of the controversy at the time we commenced the inquiry into the facts. The majority of the committee had previously reported to the House that the administration claimants had received at the poll a majority of votes of from thirty to one hundred and ninety-eight; hence it will be perceived that the party having such majority were interested to make the proof of illegal votes as difficult as possible. Any general rule, the effect of which, though administered with impartiality, should be to increase the embarrassment, would obviously operate in their favor; and, we ask, what rule could be better adapted to the end suggested, than that of giving an inordinate effect to the reception of a disputed vote at the polls? This idea was a prolific source of difficulty to the committee, and, what is of more consequence, of flagrant injustice to one of the parties. One of the many progeny of this suggestion was, the legal absurdity that the party objecting on the ground of alienage must, under all circumstances, prove not only that the voter was an alien born, but, in addition, that he never had been naturalized. The committee knew, at the outset, that Messrs. Aycrigg and others expected to prove many alien votes to establish

their right to the seats; this was set forth fully in the exposition of facts which they submitted to the committee at an early stage of the proceedings. The House cannot fail to observe how admirably the rule of negative proof is fitted to embarrass one side of this controversy, and to fortify the position of the other side; but, nevertheless, it is the duty of the party thus embarrassed to submit to the evil, if the rule itself be founded in law. But we insist that it is not so founded. No precedent can he found of the application of such a rule to such a case. The party having the affirmative of the issue takes the burden of proof. A foreigner comes to the polls and votes: you can prove that he is such, but how can you prove that he has not been naturalized? Perhaps he may be willing to testify, and then you may prove the fact by his own oath. But suppose he is dead, or has removed away, or chooses to stand mute; he cannot be put to the question—he cannot be compelled to criminate himself. The rule imposes on the party objecting the necessity of searching all the records in the Union, and of getting the testimony of every record-keeper to prove the fact. This is manifestly impossible. No man in his senses can believe that any such rule exists. It is a principle of the law of evidence "that the affirmative of the issue must be proved; and he who makes an assertion is the person who is expected to support it, before he calls on his opponent for an answer." And again: "the burden of proof lies on the person who has to support his case, by proving a fact of which he is believed to be cognizant." (*Vide* Rogers's Law and Practice of Elections, pages 114–117.)

To suppose any member of the committee to be ignorant of a rule of law so old and universal, and founded in so much good sense, would be to justify his integrity, and maintain his impartiality, at the expense of his judgment, and of every qualification required for the proper discharge of the duties of a committee on elections. We disclaim all design of charging the course adopted by the majority to corrupt intentions, but we are very reluctant to embrace the other branch of the alternative; and conclude, therefore, that some strange prejudice must have taken possession of the mind, and led the judgment captive at will.

But not only did the committee adopt a very extraordinary rule, but they applied it to the case in a very extraordinary manner; and they essentially aggravated the evil which that rule was adapted to inflict. For they held votes to be lawful on account of the absence of proof of non-naturalization in cases where—

1. The election officers decided that aliens had a right to vote according to law, and avowedly admitted them to vote on that ground.

2. Where aliens were summoned before the magistrates who took the evidence, and where they refused to attend, or, if they attended, stood mute as to their right.

3. Where the two circumstances above indicated were combined, as they were in many of the cases submitted to the committee.

4. Where aliens produced at the polls, as evidence of naturalization, a declaration of an intent to become naturalized at a future period; which we all know is a mere preliminary step to, but is not naturalization itself.

In many cases the committee held votes to be lawful where all the above circumstances were united against the voter; and we should be wanting in duty to the contesting parties, to the people of New Jersey, and of the whole country, if we did not bring the conduct of the majority, in this particular, distinctly to the notice of the House.

The House adopted the report of the committee *without debate*—yeas 101, nays 22; just a quorum, a large number of the members declining to vote.

The minority report claimed that three only of the "whig contestants" were entitled to seats, but did not recommend any specific action to the House.

NOTE.—The debates and reports in this celebrated case are so voluminous that no attempt has been made to extract from the former, or to give the latter in full. The reports and evidence will be found in full in Reports of Committees, 1st session 26th Congress, vol. 2, p. 506; vol. 3, p. 541.

The debate lasted from December 2, 1839, to July 17, 1840—the first fortnight without intermission of a day. No speeches were made upon the main report. The entire debate will be found in volume 8 of the Congressional Globe, 1st session of the 26th Congress.

TWENTY-SIXTH CONGRESS, FIRST SESSION.

INGERSOLL *vs.* NAYLOR, *of Pennsylvania.*

Where extensive frauds were alleged the committee refused to receive hearsay evidence. A political census taken was considered too vague and uncertain upon which to base a judicial decision.

IN THE HOUSE OF REPRESENTATIVES.

JULY 17, 1840.

Mr. FILLMORE, from the Committee of Elections, made the following report:

That the respective parties to the contest, at the request of the committee, stated in writing the grounds on which they relied, and were then authorized by the committee to take their evidence by deposition. The testimony thus taken, together with numerous records from the prothonotary's office, was laid before the committee, and the argument upon the same closed on the 29th day of May, 1840; when Mr. Medill moved that the depositions in the case be printed. Mr. Fillmore moved, as a substitute, that the committee would then proceed to decide the case; and the question being taken on Mr. Fillmore's substitute, it was lost by a tie vote—Mr. Botts being absent; and consequently there being but eight members present. The motion of Mr. Medill was then adopted by a vote of five to three.

The committee then proceeded to an investigation of the New Jersey case, in which they were engaged every day until late on Saturday night of the 11th instant. On the Monday following this case was again taken up; and on Tuesday, the 14th, the committee, on motion of Mr. Botts, by a vote of five to three, adopted the following preamble and resolution:

Whereas, in the opinion of this committee, no evidence of fraud or illegality has been exhibited sufficient to justify a recommendation to the House of Representatives to set aside the election held for the third congressional district of the State of Pennsylvania, in the year 1838:

Resolved, therefore, (as the opinion of this committee,) That Charles Naylor, esq., was duly elected a member of the 26th Congress of the United States; and that the chairman of the committee be instructed to prepare a report to that effect, to be presented to the House of Representatives.

At the request of the chairman, who was at that time engaged in preparing a report on the New Jersey case, Mr. Fillmore consented to act in his place, and has prepared the report which is now presented to the consideration of the House.

The testimony in this case is very voluminous, comprising five hundred and forty-two printed pages, besides large bundles of manuscripts, which the committee deemed it unnecessary to print. The late day at which the committee came to this decision, with the press of business incident to the close of a pro-

tracted session, precludes the idea of entering into and analyzing this undigested mass, the material portions of which are now ready to be laid before the House.

Without dwelling longer upon this subject, the committee proceed to make a few remarks upon the merits of the controversy. Mr. Ingersoll having the affirmative, limited the grounds of his complaint to the election district of Spring Garden, and to five of the seven wards of the incorporated district of the Northern Liberties. As to the five wards of the Northern Liberties, he alleged, in substance, that by a conspiracy among the election officers to carry the election by fraud, many hundred names were illegally and fraudulently added to the registries of voters, being the names of persons having either no existence or no right to vote, whose votes, or pretended votes, were nevertheless counted and allowed to Mr. Naylor.

A large amount of hearsay evidence was brought forward to sustain this among other allegations; but it was of that character that the committee do not deem it worthy of any consideration or credit; and the most material parts of it were fully contradicted by competent and unimpeached testimony on the other side. The rule upon which the committee reject all this hearsay evidence they conceive too well settled and too clear and just to require any argument. If all experience has shown that in the administration of justice in the most petty and trifling matters between man and man there is no security for truth without the sanction of an oath, every one must admit that in a controversy which enlists the strongest passions of our nature, often stimulated by ambition and partisan prejudice and animosity, we cannot safely dispense with this great security. If evidence of this character were received, it might be manufactured with impunity to any amount, and no representative could be secure of his seat for a single day.

Mr. Naylor's majority is 775. No attempt was made by direct evidence to purge the polls; nor has the petitioner shown, or attempted to show, that a single illegal vote was received by the officers of election, or a single fictitious one allowed to the sitting member. Though the addition of a large number of names to the register in one of the wards in Spring Garden, by the officers whose duty it was to prepare it, was a suspicious circumstance, requiring careful scrutiny; yet, as the error, if any, was corrected before the election commenced, and as there is no proof of any illegal vote having been given in that ward at that election, the committee do not see how this fact can possibly be invoked to affect the result.

The attempted political census, had it been otherwise competent, was clearly too vague and uncertain to lay the foundation for any judicial decision; all the material facts in it come under the general denomination of hearsay evidence of the most loose and unsatisfactory kind; and, besides, when contrasted with the other authentic evidence, it becomes utterly worthless. The inductive evidence attempted to be drawn from the registry, as to the number of persons who voted, and of their qualifications, is little more satisfactory. There is no necessary and legal connexion between the names and number of persons who voted and the checks on the registry. The window-list is the true record to determine, not only the names of those who voted, but more especially the number. This is well illustrated by the attempt to show, by *calculation*, that there were 1,076 persons who voted that were not registered; whereas, by a comparison of the names on the window-lists with those on the registers, the result was shown to be utterly fallacious, and that there was not a single person who voted that was not registered. Surely, arithmetical calculations founded upon such uncertain and unsatisfactory bases are wholly unworthy of credit.

The petitioner also charges a number of small irregularities in conducting the election and counting the votes, consisting mainly in slight deviations from the strict requirements of the law. There is no proof that any injustice was done

or fraud intended; and, as there was manifestly a substantial compliance with the law, the committee do not conceive that it could be for the advancement of substantial justice to entertain objections of this kind. Our election laws must necessarily be administered by men who are not familiar with the construction of statutes; and all that we have a right to expect are good faith in their acts, and a substantial compliance with the requirements of the law. The evidence clearly justifies the committee in coming to this conclusion. It seems there was no essential difference, in this respect, as to the manner in which the election was conducted in these districts, and in those of which no complaint is made; but it is in proof, by an officer who had long officiated in these elections, that it was conducted as the elections in that county had been conducted for the last thirty years.

As to the district of Spring Garden, the chief allegation made by the petitioner is, that the officers of that election, in order that they might carry the election for Mr. Naylor, were not sworn; and that therefore it should be set aside.

The chief witness (and indeed the only one) by whom this allegation is attempted to be sustained, is William G. Conrow, one of the officers of the election, and the return judge of the district. As this is almost the only evidence introduced on the part of the petitioner that comes directly to the point in issue, the committee deem it worthy of a brief examination.

It appears from the depositions that, on the 27th day of March last, Mr. Ingersoll called Mr. Conrow as a witness, who was then "*duly affirmed.*" He was then interrogated, on behalf of Mr. Ingersoll, to know whether the election officers of Spring Garden were sworn or affirmed; and declined answering, for the alleged reason that "*no persons had a right to answer questions to criminate themselves, or make them appear notorious.*"

On the 30th of the same month he was re-examined by Mr. Ingersoll on the same affirmation, but said nothing as to the qualification of the officers at Spring Garden. Subsequently the following named officers of that election, namely, John Stout, jr., Daniel R. Erdman, John Sloan, David Woelpper, John D. Ninesteel, Joseph T. Rowand, Jesse Williamson, and Daniel J. Weaver, were called and examined as witnesses on behalf of Mr. Naylor, and testified, in substance, in the most direct and unqualified manner, that all the election officers of Spring Garden, including themselves and Mr. Conrow, were duly sworn or affirmed, according to law; that they, respectively, signed in duplicate the oath or affirmation which they had taken; and that the election had been, in all respects, legally and fairly conducted.

Nicholas Esling, esq., the justice of the peace who qualified them, also testified that he administered the oaths and affirmations to "all the officers in that district, according to law, before the opening of the polls; and that after the oaths and affirmations had been signed by the respective officers to whom they were administered, he certified them according to law."

It was also proved that Mr. Conrow had stated that he filed the oaths and affirmations in the court of common pleas; and James Hanna, another witness, stated that he was confident that he had seen them. But it is said that the oaths and affirmations required by law are not now to be found in the office of the prothonotary of the court of common pleas. This would be a circumstance of some importance, did it not also appear that the papers in this case had been taken before a committee of the Senate, at Harrisburg; and that they were so negligently and carelessly kept by the prothonotary, that they were permitted to be carried out of the office by different persons. Indeed, it appears from the testimony of the present prothonotary, that when he came into office some of these election papers were out, and remained out for some months; and he seems to be a little uncertain where they were, or who returned them. The

fact that any of these papers are missing under such circumstances is certainly very slight evidence to show that they were never there.

After the examination of the above-named witnesses, Mr. Conrow was again called by Mr. Ingersoll, and testified that the other election officers of Spring Garden, besides himself, were either sworn or affirmed "*to do justice to their party this* [that] *day;*" that this mock-oath was administered by Nicholas Esling, esq., "either on a Philadelphia Directory, or the Narrative of the Sufferings of some shipwrecked mariner."

This statement, with some others, it appears by the cross-examination, was read by the witness from a paper which he held in his hand and taken down by the commissioner. Mr. Naylor's counsel asked to see this paper, that he might ascertain in whose handwriting it was, and annex it to his deposition. This the witness declined, and said: "*I can't let it go, sir. I write two different ways. I sometimes give my writing the wrong position.* Every word of it is written by myself; every word and letter of it made upon my desk."

He was asked the following question: "Before you were examined the first time, you were solemnly affirmed to tell the truth, *the whole truth*, and nothing but the truth; why did you not, under that solemn obligation, at your two first examinations, disclose what you have here, at your third examination to-day, related the first time?"

To which he replied, "*I thought it might be necessary to hold back some things* AS REBUTTING TESTIMONY. *I wished to say as little as possible on this subject*"

He denies all knowledge of any fraud or unfairness in the election. From all this, it is contended (and with much truth, in the opinion of the committee) that the testimony of this witness, independent of the contradictory evidence, is open to suspicion. It is fair to be inferred, from his first examination, that there was some unkind feeling between him and Mr. Naylor. His refusal to testify to these facts when first called, and holding them back when under solemn affirmation to tell the *whole truth*, for the avowed purpose of using them "*as rebutting testimony;*" his reading his testimony from a paper, which he refused to show, and which there is reason to suspect was not in his *usual* handwriting; and his solemn affirmation (as may be seen by the evidence) that no regular district return, under the hands of the officers, was made out, whereas this original return, under his own hand and seal, has been produced to the committee; and, finally, his own participation in the act;—we say that all these circumstances very properly throw a strong shade of doubt over the credibility of this witness. But when, in addition to that, he stands directly confronted and contradicted by a large number of unimpeached witnesses, the committee would do violence to all the known rules of judicial investigation if they did not pronounce his evidence as wholly unworthy of credit. The story itself is extremely improbable. That so many men, thought worthy of official trust by their fellow-citizens, should, in the presence of each other, unblushingly submit to such a profane degradation as that mock-oath implied, and that such an oath should be administered and taken, and yet no fraud perpetrated or attempted, is (to say the least of it) approaching to the marvellous. Why was a profane book used for an iniquitous oath? Really, it seems to us to require better proof than this, even without contradiction, that twenty gentlemen, (that being the number of officers,) who had hitherto sustained good characters for probity and honor, should voluntarily become the actors in a scene so blasphemously immoral. But it is a relief to the mind to feel that the contradictory evidence is so ample that no doubt remains.

The committee would be happy to touch upon other points in the testimony did time permit—not so much because they deem them important, as to show that they had not been overlooked in coming to this conclusion.

In conclusion, it is thought due to Mr. Naylor to say that there is no evidence to raise a suspicion that, if any fraud or illegality was meditated, it was with his knowledge or consent. No witness has testified to a single dishonest or dishonorable act on his part.

The committee submit to the House the following resolution:

Resolved, That Charles Naylor was duly elected a member of the House of Representatives for the twenty-sixth Congress, from the third congressional district in Pennsylvania.

In the House Mr. Rives offered the subjoined resolution when the case came up for consideration:

Resolved, That the Speaker of this house be requested to issue a *subpœna duces tecum* to Samuel Hart, esq., prothonotary of the court of common pleas for the city and county of Philadelphia, directing the said Samuel Hart, esq., to appear personally, or by deputy, before this house, at 1 o'clock p. m. on Monday, the 18th instant, with the election returns and other papers on file in his office, relating to the congressional election in the third congressional district in the State of Pennsylvania in 1838, there to be examined in evidence in the case of contested election now pending between C. J. Ingersoll and Charles Naylor, from the said congressional district.

Objection was made, and the majority report was adopted by the House, after listening to the arguments of the contestant and the sitting member, January 15, 1841.

TWENTY-SEVENTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. HALSTED, New Jersey.
BLAIR, New York.
CRAVENS, Indiana.
BORDEN, Massachusetts.
SUMMERS, Virginia.
Mr. GAMBLE, Georgia.
A. V. BROWN, Tennessee.
MEDILL, Ohio.
J. W. WILLIAMS, Maryland.

SECOND SESSION.

Mr. HALSTED, New Jersey.
BLAIR, New York.
CRAVENS, Indiana.
BORDEN, Massachusetts.
RANDALL, Maine.
Mr. BARTON, Virginia.
TURNEY, Tennessee.
HOUSTON, Alabama.
REYNOLDS, Illinois.

JOSHUA A. LOWELL, *of Maine.*

No report was made in this case, but the facts are set forth in the memorial subjoined:

The undersigned, citizens and legal voters in the eighth congressional representative district in the State of Maine, ask leave to represent:

That on the 15th day of October, in the year of our Lord eighteen hundred and forty, the governor of Maine issued his warrant to the selectmen of the several towns of the counties of Hancock and Washington, and which compose said district, to notify the legal voters of said towns to assemble on Monday, the 2d day of November then next, to give in their votes to them for a representative to the Congress of the United States, and to make due return of the votes so received to the secretary of state.

That, on the 26th day of December last, a report in council was made, declaring that, in that election, the whole number of votes from said district was ten thousand three hundred and eighty-four; necessary for a choice, five thousand one hundred and ninety-three; that Joshua A. Lowell had five thousand one hundred and ninety-four, and was elected; whereupon the governor caused a certificate of such election, under the broad seal of the State, to be delivered to the said Joshua A. Lowell.

That it appears by the return from the town of Charlotte, in the county of Washington, now in the office of the secretary of state, and by said report in council, that Joshua A. Lowell had sixty-three votes, and that votes for no other person were returned or counted; but that it can be made to appear, by the testimony of the electors of said town, that many votes were given in for Joseph C. Noyes; and that by the records of said town it appears that the number of votes given in for said Noyes were twenty-nine, and those for Lowell were sixty-two; and that, if those votes had been returned and counted, said Lowell would not have been declared elected.

That the governor's warrant was directed to all of the towns in said district, and, by law, it ought to have been seasonably delivered to the selectmen of every town; yet it can be made to appear that said warrant was not seasonably delivered to the selectmen of the town of Dedham, in the county of Hancock, by reason whereof the inhabitants of that town were not required to, and did not, give in their votes for a representative on that day, which was contrary to the constitution and laws of the State of Maine.

That twelve votes, returned by the selectmen of Springfield as given by inhabitants of said district for Joseph C. Noyes, were improperly rejected by the council, and that votes for Joshua A. Lowell were received and returned by the assessors of Presqu'isle plantation from persons living out of the said district, and which were improperly counted in said report.

Wherefore, we respectfully request that inquiry may be made into the matters set forth in this remonstrance; and if it shall appear that Mr. Lowell did not receive a majority of all the legal votes given, or that all of the legal voters in said district were not duly notified to give in their votes at that election, that he may not be permitted to hold his seat in said House under said certificate, but that a vacancy be declared in this district.

The sitting member submitted the following reply to the memorial:

To the honorable Committee of Elections of the House of Representatives of the United States:

GENTLEMEN: The remonstrance of George Hobbs, Ichabod R. Chadbourne, and sixteen others, against my right to a seat in said House, as representative from the district of Hancock and Washington, in the State of Maine—which remonstrance is not "addressed to the House," was not "presented by the Speaker, or by a member in his place," and "a brief statement of the contents thereof made verbally by the introducer," and which, therefore, should not have been received and referred—is founded upon three grounds, namely:

First. An alleged error in the return of votes given in the town of Charlotte, in the county of Washington, of thirty votes.

Second. That twelve votes, given in the town of Springfield, by persons living within said district, for Joseph C. Noyes, were rejected by the governor and council, and the votes of persons residing without said district were received and counted at Presqu'isle plantation.

Third. That the warrant or precept from the governor, for the meeting to elect a member of Congress for said district, was never received by the inhabitants of the town of Dedham, in the county of Hancock, and no meeting of the inhabitants was called for the choice of representative, whereby the inhabitants of said town of Dedham were wholly disfranchised, contrary to the constitution and laws of the State.

The remonstrance of B. W. Hinkley, Thomas Robinson, and fifty-one others, is the same in substance as the first; and, in answering the allegations contained in the former, I shall necessarily answer those contained in the latter.

Before making a definite and formal answer to the allegations in said remonstrance, it may not be improper for me to state that the laws of Maine regulating the election of members of Congress require a majority of all the votes given by qualified electors, at the time, places, and in the manner therein prescribed, and returned, according to law, by the proper officers to the office of the secretary of state within thirty days next succeeding the election.

It is made the duty of the secretary of state to lay the returns so made before the governor and council, and it is the duty of the governor, "in case of an election for any district by a majority of votes returned from such district, forthwith to transmit to the person or persons so chosen a CERTIFICATE OF SUCH CHOICE, *signed by the governor and countersigned by the secretary.*"

At the meeting on the second Monday in September, 1840, three candidates were voted for and no election was effected. In pursuance of law the governor ordered a second trial on the first Monday in November, then next and now past, being the time of the presidential election, and precepts were duly issued to the several towns and plantations in the district for that purpose, and the sheriffs of the respective counties seasonably transmitted the same to the selectmen of the several towns and the assessors of the several plantations within the district, according to law.

At the second trial there were also three candidates, namely: Hon. Jos. C. Noyes, Samuel Wheeler, esq., and myself.

The whole number of votes returned, as given in said district, was ten thousand three hundred and eighty-four, of which number I received *five thousand one hundred and ninety-four*, Mr. Noyes five thousand and fifty-one, Mr. Wheeler one hundred and thirty-three, and there were six scattering votes; by which it will be seen that I had *a majority of four votes*

over all others. The returns were laid before the governor and council, and, there being an election, the governor, in accordance with the requisition of the law, transmitted to me a certificate of such choice, under the great seal of the State, signed by himself and countersigned by the secretary, which certificate I herewith submit and make a part of the case.

It is not contended that such certificate is *conclusive evidence* of the right of a member to a seat in the House, although it is *prima facie* evidence of that right. It may be *rebutted* and *invalidated* by *legal* and *satisfactory proof* that it was founded either upon *fraud* or *error*. But the *burden of proof* is upon those who contest the seat; and they ought to be required to produce *clear, strong, and convincing evidence* that the person holding under such certificate was not duly elected.

To the allegation that there was an erroneous or false return from the town of Charlotte, in the county of Washington, I answer, that I do not know, of my own knowledge, whether said allegation be true or untrue. The selectmen and clerk of said town, with whom I am not personally acquainted, sustain a fair reputation in the community, and are regarded as gentlemen of unimpeachable characters. That they committed an error or fraud of the kind alleged, in making the returns of votes, although *possible*, is *highly improbable*, and *contrary to the natural and legal presumption*; and I therefore deny the statement made by the remonstrants in relation to said pretended error or fraud in the returns of votes from said town.

But if said alleged error were proved clearly and conclusively, I should still be entitled to the seat by a correction of the erroneous returns made against me, by a rejection of all the illegal votes given at the election, and an allowance of all the legal votes tendered by qualified electors, and rejected by the presiding officers.

Should the committee determine to go behind the certificate of election for the purpose of correcting errors made in my favor, it is presumed that they will also give me a fair and reasonable opportunity to prove the existence of errors made against me; that illegal votes were received and allowed against me, and legal votes tendered for me and rejected; and that they will cause a commission or some legal authority to be issued, to take depositions to prove these facts, and allow a sufficient length of time to procure the testimony. In which case, I believe that I can *prove* that the paper purporting to be a return of votes from Long Island plantation, in the county of Hancock, stating that a legal meeting was held in said plantation on said second day of November, and that Joseph C. Noyes received 23 votes, and making no mention of there being any votes for any other person, was not only illegal upon its face, the number of votes being in *figures*, and not written in words at length, as required by law, but was wholly untrue and erroneous in point of fact; that no such plantation was organized according to law, or had any legal existence; that no limits of such plantation were returned by the assessors to the secretary of state, and by him recorded, as required by law; that no names of the voters were returned, as required by law; and no assessors and clerk chosen and sworn, as required by law; but that the meeting, if any such were held, was called without law, by persons having no authority; and that said votes, if any such were given, were given by persons who were not qualified electors. Also, that the meeting at a place called Plantation Number Thirty-three, in said county of Hancock, from which there was a return made of six votes for Joseph C. Noyes, and one vote for myself, was wholly illegal, the same having been held two hours before the time at which it was notified to be held, the votes having been received and the people dispersed before the time arrived for opening said meeting; and that the votes were not received, sorted, counted, declared, and sealed up, in open plantation meeting, as required by law.

Also, that the town meeting in Machias Port, in the county of Washington, from which there were returned seventy-four votes for Joseph C. Noyes, one vote for Peter Talbot, and sixty-seven votes for myself, was wholly illegal, the same not having been notified or warned according to law, or in the manner legally agreed upon by the inhabitants of said town; one if not both of the notifications for said meeting, required by law and long established usage to be posted up, containing an article for a meeting to choose electors of President and Vice President, but none for the choice of a representative in Congress, whereby many qualified electors and legal voters, who would have attended said meeting and voted for me, if they had known of the same, were wholly disfranchised.

I believe I can also prove, if a reasonable time be allowed for that purpose, that a large number of persons, not qualified electors in said district, were permitted to vote in said election; and that their votes were received, counted, and allowed against me, to wit: the votes of *aliens*, being citizens of the British provinces: the votes of citizens of Massachusetts, of Connecticut, of New York, and other States; the votes of *minors*, under the age of twenty-one years; of *paupers*, and persons under *guardianship*, and of *non-residents*, or persons who had not had their residence established, as required by the constitution of Maine, in the town or plantation where they were permitted to vote, for the three months next preceding the day of election.

I have not yet been able to ascertain the precise number of persons so disqualified who voted against me at said election; but, from the best information I could obtain, prior to my leaving home in May last, I am of the opinion that there were more than one hundred illegal votes received, counted, and allowed against me, at said election.

The laws of the United States do not provide for taking testimony to be used in cases of contested congressional elections; and the laws of Maine, while they provide for taking tes-

timony to be used in cases of contested elections in the State legislature, are silent on the subject of contested elections in Congress. Testimony to be used in contested elections to Congress can therefore be taken in Maine *only by the consent of parties, or by virtue of some power to be given to commissioners by the House itself.* And I here repeat the notice which I gave to the committee, at their session on the first instant, that I shall object to all evidence heretofore taken, which has been or may be offered against my right to a seat in the House, as taken *ex parte, without law and against law.*

Should the committee consider it proper and expedient to make any examination beyond the certificate of election, I desire that capable, discreet, and judicious men may be appointed, in different parts of the district, with power to send for persons and papers, take depositions, and compel the attendance of witnesses before them for that purpose; and that a reasonable time be allowed for taking and returning said testimony.

To the allegation that twelve votes were given for Joseph C. Noyes in the town of Springfield, and rejected by the governor and council, I answer: That the town of Springfield is not within said congressional district, and never was within said district, but is within the county of Penobscot, in the congressional district of Penobscot and Somerset—a fact which is not mentioned in either of said remonstrances. It does not appear that said votes were given by qualified electors, and, in point of fact, they were not given by qualified electors. 1st. The persons giving the votes did not reside in an incorporated town, or organized plantation, or in an unincorporated place adjacent to an incorporated town within the district. They were not, therefore, qualified electors to vote for representative in Congress *in any* place. 2d. If they were qualified electors *within the district*, there is no law by which they could vote *out of* or beyond the limits of the district. 3d. There is no law authorizing the selectmen of Springfield, or any other officers of any city, town, or plantation, beyond the limits of the Hancock and Washington congressional district, to call meetings, to receive, sort, count, declare, seal up, and return votes for a representative in Congress to represent said district. 4th. No vacancy existed in the Penobscot and Somerset district, within which said town of Springfield lies. 5th. No precept was issued to the selectmen of Springfield, or any other town in said Penobscot and Somerset district, by the governor. 6th. No warrant was issued by the selectmen of Springfield for notifying a meeting to elect a member of Congress. 7th. No notice was given of a meeting in said town to elect a member of Congress. 8th. The meeting in said town was called for the choice of electors of President and Vice President, and for no other purpose. 9th. The whole proceeding on the part of the selectmen of Springfield was *extra official and without law*; and their certificate of votes for a member of Congress in another congressional district was entitled to no other consideration than a similar certificate from the same number of private individuals. Finally, there is no view of the subject in which said *certificate* could be regarded as *competent evidence*, and no principle on which votes so given could be *received, counted, and allowed as legal.*

To the allegation that "the votes of persons residing without said district were received and counted at Presqu'isle plantation," I answer, that I believe the same to be untrue. If such votes were given, they should be rejected, and deducted from the votes of the candidate to whom they were given. The names of the persons who voted for member of Congress in said plantation were duly returned, and are now on file in the office of the secretary of state. If any person who did not reside within the district voted for member of Congress in said plantation, and voted for me, it can be easily shown by those who make the allegation. By the return of votes from said plantation, it appears that there were one hundred and nine votes given for electors of President and Vice President, and but one hundred and four votes given for member of Congress. The natural presumption is, therefore, that persons residing in the plantation, but not within the district, voted for electors of President and Vice President, as they could rightfully by law, but did not vote for member of Congress.

The remaining allegation, viz: that the warrant or precept for the town meeting on the second day of November was never received by the inhabitants of the town of Dedham, in the county of Hancock, and no meeting was held in said town for the choice of a representative to Congress, may or may not be true; but, if true, would not invalidate the election.

A warrant was duly issued by the governor, addressed to the selectmen of that town, which was received by the sheriff of the county, a gentleman of the highest integrity and of great public character, and was, according to law, transmitted seasonably, in the usual way, by him to said selectmen; and I believe the same was duly received by said selectmen. If, however, they did not receive it in season to notify a meeting, it was probably in consequence of some accident or mistake on the part of the selectmen or other inhabitants of said town; and it is respectfully submitted, that no congressional election has ever been set aside, and ought never to be set aside, for an accidental omission in a single town, especially where the votes of such town would not change the result.

In conclusion, I remark that, from all the information I have been able to obtain in relation to the election, *I do not entertain a doubt that I received a majority of the legal votes given by qualified electors in the district; that I had a majority of the votes legally returned to the office of the secretary of state; that I was entitled to the certificate of election, and am now the legal representative of said district in the Congress of the United States.*

J. A. LOWELL.

HOUSE OF REPRESENTATIVES, *July* 6, 1841.

The Committee of Elections submitted the following resolution to the House:

Resolved, That the Hon. Joshua A. Lowell is entitled to his seat as a member of the 27th Congress from the State of Maine.

The House agreed to the resolution without a division.

NOTE.—The only speech on this case was made by Mr. Randall, of Maine, and will be found in vol. 11, part 1, Cong. Globe.

TWENTY-SEVENTH CONGRESS, SECOND SESSION.

DAVID LEVY, *of Florida Territory.*

In this case it was alleged that the delegate (from Florida) was not a citizen of the United States. Although the evidence was not conclusive, the committee was of opinion that the *spirit* of the naturalization policy of the country had been fully satisfied. It was also held that the domicile of the father is the domicile of the son during the minority of the son, if the son be under the control and direction of the father. During the first session the committee reported against Mr. Levy, but upon a more thorough examination of the case, at a subsequent session, that decision was reversed. The final report only is given.

IN THE HOUSE OF REPRESENTATIVES,

MARCH 15, 1842.

MR. BARTON, from the Committee on Elections, to which the subject had been referred, submitted the following report:

That the objection made to the right of the delegate rests solely upon the allegation that he is not a citizen of the United States. His election by a due majority of the legal voters of Florida has not been disputed. They have examined the question raised with that care and scrutiny, and at the same time with that liberality, which was due to the interesting and important consequences involved, both as respects the delegate whose political relations with this country are brought into question, and the character of the nation and of this House for justice, and for the observance of that good faith in its national policy which is at once the duty and the ornament of civilized governments. For it will be perceived, in the course of the report, that the degree of credit which should be given to the hitherto recognized acts of certain public officers of the government, evidenced by their authenticated certificates, constitutes an important feature in the inquiry which has been committed to them; and though, in this particular instance, the satisfactory proof which has been made, by extrinsic evidence, of the fact intended to be certified to by those officers, has rendered a consideration of the effect of their acts by no means essential, yet it cannot escape observation that very important and delicate interests of a portion of the population of Florida may, at some time, become involved in litigation by the decision of the House.

After a mature consideration of the additional evidence that has been presented to them, taken in connexion with the testimony reported at a former session, the committee have been led to a conclusion the reverse of that to which they arrived upon that occasion.

In reporting this result, it is due to themselves to say that the merits of the case were not so fully exhibited in the testimony laid before the committee at that time, and that if the facts had been as fully understood then as now, the necessity of a review of the subject at this session might have been spared.

It is admitted by the delegate that he is not a native-born citizen of the United States. But it is in proof that he has lived in the United States from the early age of eight or nine years, has grown up in the belief that he was a

citizen, and has exercised the rights and performed the duties of citizenship from the time of his maturity. His right rests upon the 6th article of the treaty between Spain and the United States, of the 22d February, 1819, by virtue of which he claims that his father became a citizen from the day of the cession of Florida to the United States. His father has been a resident of the United States for more than twenty years, has *twice* taken the oaths of abjuration and allegiance, and is still resident in the country. It is evident, then, that the *spirit* of the naturalization policy of this country has been fully satisfied; and that if the delegate is evicted of the right of which he has been up to this time in the enjoyment, it must be upon purely technical grounds, and must operate with great harshness and severity upon him.

No principle has been more repeatedly announced by the judicial tribunals of the country, and more constantly acted upon, than that the leaning, in questions of citizenship, should always be in favor of the claimant of it. And it is a principle so entirely accordant with the policy and spirit of our institutions that its propriety cannot fail to meet with ready and general acknowledgment. In the interpretation, too, which such a stipulation as that contained in the 6th article of the Florida treaty should receive, the utmost liberality is dictated, as well by reason and a just policy, as by the rules laid down by writers upon public law, and adopted in the practice of all civilized nations. It was a stipulation in behalf of the subject, in favor of liberty and the security of individual rights—it was a stipulation favorable to population—it was a munificent benefit conceded by the government to those the protection of whose persons and property it was about to assume; and for all these reasons is entitled to a liberal and extensive application. No higher evidence could be required of the beneficent purposes of our government towards those who were connected with the Territories, the dominion of which it was about to acquire, than is afforded by the terms of the article referred to; and it would ill become the representatives of the nation to restrict by nice and over-scrupulous distinctions the benefits designed to be conferred.

It is not, then, with a narrow and contracted spirit that the question involved in this case should be examined or decided.

The first point to which the committee have directed their attention is, as to the fact of the inhabitancy of Moses E. Levy (the father of the sitting delegate) in Florida at the time of its transfer to the United States.

It is proper, in the first place, to fix with precision the day from which the transfer of Florida dates. It is matter of historical record that the transfer of the ceded country, under the treaty with Spain, commenced at St. Augustine on the 10th July, 1821, and was completed at Pensacola on the 17th day of the same month. Upon the same day Governor Jackson issued his proclamation, according to a form furnished to him from the State Department for the purpose, announcing that the government theretofore exercised over the provinces of the Floridas, under the authority of Spain, had ceased, and that that of the United States of America was established over the same.

This proclamation, together with the several commissions under which Governor Jackson acted, will be found annexed to this report, marked No. 2.

It was on the 17th day of July, 1821, then, that the sovereignty of the United States over the Floridas was proclaimed, and this day appears to have been universally adopted as the day of the transfer—the point of time from which the cession dates, without reference to the different days upon which the flags were exchanged at St. Augustine and Pensacola. It was so adopted in the legislation of Governor Jackson, while administering the government in Florida, and acquiesced in by the executive department of the United States government. It was so expressly adopted afterwards in the legislation of Congress, in an instance of striking applicability, to wit, the act of Congress of 26th May, 1822, granting donations of land to certain actual settlers in the Terri-

tory of Florida," (Laws of U. S., vol. 7, p. 294;) in which act the land commissioners are directed "to receive claims to land founded on habitation and cultivation commenced between the 22d February, 1819, and the 17*th July*, 1821, *when Florida was surrendered to the United States.*" This act applied to every part of Florida.

The same direct and specific designation of that day as the day of transfer, and applicable to the whole of the ceded Territories, without distinction, is found throughout the local legislation of Florida; for repeated instances of which, see 1st volume of Florida Laws, pp. 11, 94, 154, *et passim.*

The committee will now proceed to the inquiry, whether Moses E. Levy was an inhabitant of Florida on the 17th day of July, A. D. 1821.

The question of domicile has been a fruitful source of difficulty to courts. It is because no fixed or universal rule can be adopted for its test. The *animus manendi* is the principal point looked to in the ascertainment of domicile. If the intention to establish a permanent residence be ascertained, the recency of the establishment, though it may have been for a day only, is immaterial. The *intent* is, in each case, the real subject of inquiry; "and the circumstances requisite to establish the domicile are flexible, and easily accommodated *to the real truth and equity of the case.*"—(1 Kent's Comm., 76.)

The proof as to the inhabitancy of Moses E. Levy on that day, as exhibited to the committee, consists—

1st. Of the certificates of Forbes and Worthington, in 1822, as to his inhabitancy.

2d. Of general testimony as to the date and character of his settlement in Florida.

1st. As to the proceedings of Worthington and Forbes, it appears that a few days after the cession of Florida an ordinance was proclaimed by Governor Jackson, the purpose of which was to provide a mode of ascertaining the fact of the inhabitancy of those who claimed the benefit of the 6th article of the treaty. The ordinance will be found at large, annexed hereto, marked No. 3. It directs that the mayor should "open a register, and cause to be inscribed the names, age, and occupation of every free male inhabitant, who may be desirous to profit by the provisions of the 6th article of the treaty, provided the person or inhabitant who may thus desire to have his name inscribed shall first satisfy the mayor, or such other person as may be appointed to open registers, *that he was really an inhabitant of the ceded territory on the* 17*th day of July*, 1821; and provided, also, that he will, of his own free will and accord, abjure all foreign allegiance, and take the oath of allegiance prescribed by the laws of the United States. The ordinance afterwards provides for the issue, to each person so registered, of certificates of inhabitancy from the register's office, and of citizenship from the secretary of the Territory, based upon such certificates of inhabitancy. The reasons which operated with Governor Jackson in the enactment of this ordinance are explained in his communication of July 30, 1821, to the Secretary of State, an extract from which is presented herewith, marked No. 4.

Under this ordinance Moses E. Levy was registered on the 4th March, 1822, as an inhabitant, took the oaths of abjuration and allegiance, and received a certificate of inhabitancy from the mayor, and a certificate of citizenship from the acting governor and secretary, Worthington. These proceedings will be found herewith, marked No. 7. A copy of the ordinance under which these proceedings occurred was transmitted to the State Department, with his communication of the 30th July, 1821, "for the approval of the President;" and on the 28th August, 1821, Secretary Worthington communicated to the Department of State a copy of his letter of same date to Governor Jackson, reporting his transactions at St. Augustine, and announces his having opened the registry required by the ordinance, in a manner calculated to attract attention. He says:

"Accordingly, under the waving flag of the Union, on the 25th, the civil officers assembled, with a large concourse of people. Some officers of the navy and army were present, and forty-odd Indians who had just come in. I opened the ceremony by a short address, confined to the occasion, then administered the oath to Judge Fitch, who successively swore in Colonel Forbes, the new mayor, and the other officers; *and the registry for naturalization was opened at the same time.*" The subject of this ordinance was thus fully brought to the notice of the executive department of this government at an early period, and appears to have received its acquiescence. At the ensuing session of Congress the letter of Governor Jackson, of the 30th July, 1821, together with the copies of this and other ordinances, were communicated to the House of Representatives, and appear to have been acquiesced in by Congress; for, by the 13th section of the act of 30th March, 1822, for the establishment of a territorial government in Florida, the laws then in force in Florida (of which this ordinance was one) were continued in force. At a subsequent period, to wit, by the act of 7th May, 1822, "to relieve the people of Florida from the operation of certain ordinances," this ordinance was, among others, repealed—the repeal to take effect the succeeding June.

On the 21st May, 1822, Acting Governor Worthington transmitted to the Department of State the register of inhabitants who had presented themselves under the ordinance, and received certificates, calling attention to the case of Moses E. Levy, which was described as a special one. No objection appears to have been made at any time by the department to those proceedings. The letter of Governor Worthington, with the register, &c., are printed at large with the former report, and may be found at pages 121 *et seq.* of this report—No. 10 of last session. (See Appendix.)

The reasons for the enactment of that ordinance, the effect and operation of the proceedings under it, and his own opinion of the degree of faith to which they are entitled, are set forth in a letter of Hon. H. M. Brackenridge, which was presented to the committee by the delegate. Although this letter cannot be received as evidence in the case, yet the high standing of the writer, his reputation as a jurist, particularly in the civil law practice, (which was at that date the system still in force in Florida,) and the excellent opportunity which he had of forming an opinion upon this subject during his long judicial service in Florida, so far entitle it to respect and consideration that the committee have thought proper to append it to the report, marked A.

The delegate brought to the notice of the committee the instances in which the proceedings under the ordinance were recognized in the transactions of the custom-house, both in his father's case and those of others whose names appear upon the register. See items Nos. 10, 11, and 12, of the evidence.

He also called our attention to the item marked No. 13, which was presented to show to what an extent titles to property would be disturbed by the repudiation of the proceedings under the ordinance. The item consists of a list of conveyances to which persons contained upon the register transmitted by Worthington are parties, taken from the records of a single county. He also referred the attention of the committee to item No. 6, showing the adoption of a similar proceeding in Louisiana, by Governor Claiborne, with the approval of Mr. Madison, then Secretary of State.

Not deeming it necessary in this case to discuss the extent to which the United States is bound to recognize and adopt the proceedings under this ordinance, the committee abstain from a decision which, if possible, involving, as it does, right of property to such an extent, should be left to the judicial department of this government. They feel free, however, to say that certain it is, Moses E. Levy could never, after that proceeding, have screened himself from responsibility as a citizen of the United States by disputing the fact of his having been an inhabitant of Florida, within the meaning and operation of the treaty s of the cession.

[The report quotes at length from the evidence, and concludes as follows :]

It appears, by the testimony, that David Levy, the delegate, arrived at Norfolk, in the State of Virginia, from the island of St. Thomas, in the West Indies, in the year 1819, (being then eight or nine years of age,) and was there put to school. That, in 1827, he left Virginia and went to Florida, to his paternal home, and has continued a resident of Florida to the present time, being a period of fifteen years' residence in Florida and twenty-three within the jurisdiction of the United States. That he has always exercised and enjoyed the rights of a citizen of the United States; that he has held repeated trusts in Florida, by election of the people, for which citizenship of the United States constituted an express qualification.

It further appears, by the testimony of his father, that he was never informed of there being any doubt, error, or misunderstanding in the statement of facts, as presented in the memorial of his said father to Governor Worthington; and that, at the time of the renewal of the oath of allegiance made by Moses E. Levy, at St. Augustine, in 1831, the delegate was living in Alachua county, which is an interior county of East Florida, engaged in the direction of his father's plantation, (see depositions of Dell and Price,) and there is no evidence that he knew anything of his father's doubts, or of the steps he had adopted to satisfy his mind. On the contrary, from his age and pursuits at the time, it is most probable that he did not. The good faith, then, in which the delegate has relied upon the indisputableness of his citizenship cannot be questioned.

It appears, further, that there have been repeated trials of his right within the past two years.

1st. Before a *grand jury* of St. John's county, sitting in St. Augustine, James Pellicer says: "I never heard his citizenship called into question until lately. It was brought before the grand jury about a year ago. Upon this grand jury there were many of the old inhabitants or natives of Florida, and the opinion of the jury was that David Levy was a citizen. The question before the grand jury was, whether the inspectors of an election had acted correctly in receiving Mr. Levy's vote. Some of his enemies brought it up before the grand jury. It was presented by David R. Dunham." This David R. Dunham is the same individual who heads the remonstrance in this case, and whose deposition, as a witness, has been heretofore noticed.

2d. By the Executive department of the United States. The letter of the delegate to the Secretary of State, dated July 25, 1840, will show that, in making application for a passport, he referred the attention of the department distinctly to the proceedings on file there, in evidence of the inhabitancy of his father. The letter is herewith published, (marked No. 27.)

3d. By the highest judicial tribunal of Florida, the court of appeals of that Territory. This court consists of the judges of the several districts, who hold their commissions and receive their salaries from the United States; and writs of error and appeals lie directly from that tribunal to the Supreme Court of the United States in the same manner as from the United States circuit courts. It appears to have been decided by that court, the judges unanimously concurring, after full argument, "that said David Levy, esq., became and was a citizen of the United States of America from the time of the definitive ratification and consummation of the treaty of amity, settlement, and limits, between the United States of America and the King of Spain, by which the Floridas were ceded to the former, by force and effect of the 6th article of said treaty, and hath been ever since, and now is, such citizen of the United States of America." This decree was rendered on the 13th day of February, 1841, and bears every mark of deliberation, for the rule under which the question came up had been issued on the 27th January preceding, and required cause to be shown on the following Friday, so that full time occurred to admit of mature consideration.

4th. By the popular tribunal; for it appears that the question has been raised before the people of St. Augustine, where the facts are best known, and that their voice has been decisive in his favor.

It is further manifest that the general sentiment at St. Augustine has been that his father and himself were in the same category with the old inhabitants generally, and their descendants.

Juan Andres, an old inhabitant, says: "Have always considered David Levy an American citizen, the same as the other young men of the place, who are sons of the old inhabitants of Florida."

James M. Gould says: "I have always been on intimate terms with the old inhabitants of St. Augustine, especially the Spanish portion, and the most prominent, and among them have never heard the citizenship of David Levy doubted. They are truly American people, who adopted the American laws after the cession, and have watched, with a jealous eye, any infringement of them, and who do more towards sustaining them than many native-born Americans. They have generally supported David Levy at the elections, and considered him as much a citizen as themselves."

Joseph Manucy, another old inhabitant, says: "I never heard that any one doubted that he was a citizen until the question was started by Peter Sken Smith. David Levy was always much beloved by the Floridians, because he behaved himself as a gentleman. I have always considered him as much a citizen as myself."

Antonio J. Triay, another old inhabitant, says: "I never heard, until lately, that any one doubted that he was entitled to the right of a citizen. I have considered him as much a citizen as myself I always considered him the same as any of the boys who have been raised here; and, so far as my knowledge goes, such has been the opinion of the old native inhabitants of the place. So far as I know my friends, they would never have voted for a person whom they supposed to be an alien."

James Pellicer, another old inhabitant, says: "Since the question of David Levy's citizenship has been before the public, the old inhabitants of the place have often discussed it; and, from what they remembered of the arrival of Moses E. Levy and of David Levy, they have always decided that David Levy was a citizen by the same right as themselves."

Pedro Benet, another old inhabitant, says: "I have always considered him a citizen, by the right of his father; and such, as far as I know, has been the general opinion of the native inhabitants of Florida who were here before the change of flags."

The 4th section of the act of Congress of 14th April, 1802, secures to the infant children of persons naturalized the benefit of their parents' naturalization, provided such children were at the time living in the United States. It matters nothing whether the naturalization be effected by act of Congress, by treaty, or by the admission of new States, the provision is alike applicable. The condition of the parent is impressed upon the child. This provision, however, of the law is not necessary in the case of the delegate; for the principle is perfectly settled and universally admitted that a minor cannot acquire a domicile, but that the domicile of the parent is the domicile of the child during minority—more especially if he be under the control and direction of the parent.

The committee do not deem it necessary to discuss further the various points, growing out of the facts above presented, in respect to the delegate's right. They have regarded the strong case made out in respect to the inhabitancy of his father—the repeated decisions which have been made directly upon the question, by a jury, by the judicial tribunals, by the executive departments of the general government, and by the people of Florida—the general sentiment upon the subject at St. Augustine, which could not have arisen and remained so long undisturbed without substantial ground—the evident good faith in

which the delegate has been so long enjoying the rights and performing the duties of a citizen—as affording a cumulative mass of evidence in favor of the rightfulness of his claim which the committee cannot otherwise than yield to. At all events, it would certainly require a more clear case than is made out by the jarring and contradictory testimony of the witnesses against him, most of whom are themselves remonstrants, to overcome the violent presumption in favor of his right which is raised by the various evidences above referred to, and the force of which but few impartial minds can fail to admit.

They therefore report, as expressive of their opinion, the following resolution, which they recommend for the adoption of the House:

Resolved, That David Levy, the present delegate from Florida, is now, and was at the time of his election, a citizen of the United States, residing in Florida, and is entitled to his seat in Congress as a delegate from said Territory.

The following resolutions have also been adopted in committee, at different stages of its proceedings:

Resolved, That, from the evidence taken since the last session of Congress, and received by the committee, together with that which was then on file, the committee are of opinion that Moses E. Levy, the father of David Levy, was an inhabitant of Florida on the day of the transfer of that Territory to the United States.

Resolved further, That the domicile of the father is the domicile of the son during the minority of the son, if the son be under the control and direction of the father.

A vote upon this case was never reached in the House. An attempt was made to continue the investigation, upon fresh evidence submitted, but it failed. Mr. Levy retained his seat to the close of the Congress.

TWENTY-EIGHTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. ELMER, New Jersey.
CHAPMAN, Alabama.
NEWTON, Virginia.
HAMLIN, Maine.
ELLIS, New York.
Mr. DOUGLAS, Illinois.
DAVIS, Kentucky.
SCHENCK, Ohio.
A. V. BROWN, Tennessee.

THE CASE OF THE REPRESENTATIVES FROM NEW HAMPSHIRE, GEORGIA, MISSISSIPPI, AND MISSOURI.

The principles involved in this celebrated contest are clearly set forth in the majority and minority reports which follow. The House adopted neither report, but it refused to unseat any representative elected by general ticket in the four States mentioned.

IN THE HOUSE OF REPRESENTATIVES,

MARCH 15, 1842.

Mr. DOUGLAS, from the Committee on Elections, made the following report:

The Committee of Elections, having had under consideration the subjects embraced in the following resolution of the House: "Resolved, That the Committee of Elections be directed to examine and report upon the certificates of election or other credentials of the members returned to serve in this house, and that they inquire and report whether the several members of this house have been elected in conformity with the Constitution and laws," submit the following report:

The second section of the first article of the Constitution provides that the representatives shall be apportioned among the several States according to their

respective numbers; and that an actual enumeration shall be made at regular periods of ten years, in such manner as Congress shall by law direct. The first section of "An act for the apportionment of representatives among the several States, according to the sixth census," approved June 25, 1842, makes the apportionment directed by the Constitution. It is a full and complete exercise of the power, and exhausts the entire authority vested in Congress by the Constitution in regard to the apportionment of representatives among the several States. The second section of the act claims to derive its validity from another portion of the Constitution relating to a different subject, and having no appropriate and legitimate connexion with the apportionment of representation. Whilst the first section is the execution of the power to apportion the representatives among the States, the second is supposed to be a partial execution of the power to prescribe the times, places, and manner of holding elections. Notwithstanding the different and distinct character of the two subjects, Congress deemed it advisable, for purposes of convenience, to embrace both in separate sections of the same act. No principle is better settled than that one portion of an enactment may be constitutional and valid, and the residue unconstitutional and void. To the constitutionality and validity of the first section of the act under consideration no objections have been made. The second section is in the words following:

And be it further enacted, That, in each case where a State is entitled to more than one representative, the number to which each State shall be entitled, under this apportionment, shall be elected by districts composed of contiguous territory, equal in number to the number of representatives to which said State shall be entitled—no one district electing more than one representative.

The legislatures of Maine, Massachusetts, Rhode Island, Connecticut, Vermont, New York, New Jersey, Pennsylvania, Virginia, North Carolina, South Carolina, Alabama, Louisiana, Tennessee, Kentucky, Ohio, Indiana, Illinois, and Michigan, divided their respective States into as many districts as they were entitled to representatives, and made provisions for the election of one member of Congress in each district; the States of Delaware and Arkansas were entitled to but one representative each, and, of course, constituted districts of themselves, without further legislation. In each of the States enumerated, the elections were held in conformity with the State laws, and the members now occupying seats upon this floor have presented satisfactory credentials, in the usual form, of their elections respectively. No question arises, therefore, as to the legality and validity of their elections, except the two contested cases from Virginia, in each of which a special report will be made in due time. In the State of Maryland, no elections for representatives to Congress have been held. The four remaining States present entirely a different case, which requires the most anxious and deliberate consideration. The legislatures of New Hampshire, Georgia, Mississippi, and Missouri, many years ago, provided for the election of as many members of Congress as they should be entitled to, respectively, by general ticket, and have continued that plan until the present time. Considering themselves under no constitutional obligation to alter their election laws, the constitutionality and validity of which having so often been recognized and sanctioned by Congress and the country, and never questioned, they deemed it unwise and injudicious to change a system which was adapted to their condition and convenience, and had so long received the approbation of their people. Indeed, some of these States could not have conformed to the second section of the apportionment act without incurring the expense and trouble of special sessions of their legislatures; for the reason that, by virtue of their constitutions, no regular sessions of their legislatures could be held between the time of the passage of the apportionment act and the period provided by the existing laws for holding their congressional elections. All the members from those States have been elected in strict compliance with the laws of their respective States,

and according to the mode adopted in many of the States for the election of representatives to the first Congress which assembled under the Constitution, and which has prevailed in the election of members from some of the States in every succeeding Congress, including the present.

It is apparent, therefore, that the second section of the apportionment act is an attempt, by the introduction of a new principle, to subvert the entire system of legislation adopted by several States of the Union, and to compel them to conform to certain rules established by Congress for their government. This new principle has produced a conflict between the laws under which the elections have been held in these four States, and the second section of the apportionment act. The conflict is so clear, so palpable, so direct, that both cannot stand; one or the other must yield. Either the State laws and all the proceedings under them are void, or the second section of the apportionment act is invalid and inoperative. The determination of a question so delicate, so grave and momentous in its consequences, imposes upon the committee and the House a high responsibility. The principles involved, and the force of the precedent o be established, give the subject an importance which elevates it far above the ordinary considerations affecting the right of twenty members to hold seats in this house. There is not only a conflict of law, but a conflict of right, of power, of sovereignty, between the federal government and four of the independent States of this Union.

Surely these considerations will be sufficient to insure a fair and impartial decision of this question upon the true principles of the Constitution, preserving alike the just powers of the States and of the general government. The sixth article of the Constitution provides that this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding. This brings us directly to the point at issue. Is the second section of the apportionment act a *law*, which has been made in pursuance of the Constitution of the United States, valid, operative, and binding upon the States? If the affirmative of this proposition can be successfully maintained, the State laws must yield to the paramount authority, and the elections under them be declared void. But a position which annuls the laws of four States of this Union, destroys their elections, and deprives them of their representation in the national councils, must not be assumed until its correctness be incontrovertibly established. The authority for adopting that section is supposed by its advocates to be derived from the fourth section of the first article of the Constitution of the United States, which is in these words:

> The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators.

It will be observed that the two clauses of this section differ materially in the tone in which they address the different governments. The one is commanded, and the other is permitted to act. The State legislatures *shall* prescribe the times, places, and manner of holding the elections; Congress *may* make or alter such regulations. An imperative duty rests upon the legislatures, whilst a mere privilege is granted to Congress. In the performance of this duty, the legislatures are clothed with a wide discretion, upon which the Constitution imposes no restraints. They may provide for elections by general ticket, or in districts; for voting by ballot or *viva voce;* for opening the polls at one place and on one day, or at different places and on different days. These, and all things pertaining to the times, places, and manner of holding elections, are confided to the wisdom and discretion of the several legislatures, to be performed in such manner as they shall deem most favorable to popular rights and just representation. The privilege allowed Congress of altering State regulations, or of making new ones, if not in terms, is certainly in spirit and design, depend-

ent and contingent. If the legislatures of the States fail or refuse to act in the premises, or act in such a manner as will be subversive of the rights of the people and the principles of the Constitution, then this conservative power interposes, and, upon the principle of self-preservation, authorizes Congress to do that which the State legislatures ought to have done.

The history of the Constitution, and especially the section in question, shows conclusively that these were the considerations which induced the adoption of that provision.

When General Pinckney proposed in the convention which formed the Constitution that the representatives "should be elected in such manner as the legislatures of each State should direct," he urged, among other reasons in support of his plan, "that this liberty would give more satisfaction, as the legislature *could then accommodate the mode to the convenience and opinions of the people.*"

After the substance of this provision had been fully and ably discussed, maturely considered, and unanimously adopted, the latter clause of the section conferring upon Congress the power to make regulations, or to alter those prescribed by the States, was agreed to, with an explanation at the time that "this was meant to give to the national legislature a power not only to alter the provisions of the States, but to make regulations in case *the States should fail or refuse altogether.*"

In vindicating this provision, whilst urging upon the people of the United States the ratification of the Constitution, General Hamilton, in one of the numbers of the Federalist, placed its defence upon the same principle: "Its propriety rests upon the evidence of this plain proposition, that every government ought to contain in itself the means of its own preservation." Notwithstanding the imperative provision that the States shall prescribe the laws of election, and the mere permissive clause that Congress may make or alter them, and the construction placed upon this section at the time, by its authors, limiting and restricting its exercise to the principle of self-preservation, yet this very clause created a more violent and formidable opposition to the adoption of the Constitution than all other portions of that instrument, and greatly hazarded its final ratification by the requisite number of States.

The conventions of the States of Virginia, Massachusetts, New Hampshire, New York, Rhode Island, and South Carolina, accompanied their ratifications with a solemn protest against the power of Congress over the elections. They proposed amendments to the Constitution, changing the obnoxious provision, and recorded on their journals perpetual instructions to their representatives in Congress to urge earnestly and zealously the adoption of those amendments, and to refrain from the exercise of any power inconsistent with the principles of the proposed amendments. The amendment and instructions of the people of Virginia relating to this subject are as follows:

The Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any State shall neglect, refuse, or be disabled by invasion or rebellion to prescribe the same; and the convention do, in the name and behalf of the people of this Commonwealth, enjoin it upon their representatives in Congress to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the foregoing alterations and provisions in the manner provided by the fifth article of the said Constitution; and in all congressional laws to be passed in the mean time, *to conform to the spirit of these amendments* as far as the said Constitution will admit.

The amendment and the instructions adopted by the convention of Massachusetts are as follows:

The convention do, therefore, recommend that the following alterations and provisions be introduced into the said Constitution: That Congress do not exercise the powers vested in them by the fourth section of the first article, but in cases where a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the

rights of the people to a free and equal representation in Congress, agreeably to the Constitution.

And the convention do, in the name and in behalf of the people of this Commonwealth, enjoin it upon their representatives in Congress, AT ALL TIMES, until the alterations and provisions aforesaid shall have been considered agreeably to the fifth article of the Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said article.

It is unnecessary to quote the instructions and amendments proposed by the ratifying conventions of the other States, as they are all of similar import. The State of North Carolina refused to ratify the Constitution, unless certain amendments proposed by her convention should be adopted; one of which was as follows:

That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislature of any State shall neglect, refuse, or be disabled by invasion or rebellion, to prescribe the same.

Thus we find that seven of the thirteen States then composing the Union, being the majority of the whole number, solemnly protested against the authority of Congress to establish regulations concerning the mode of election, or to alter those prescribed by the States; and that the Constitution was adopted with the understanding (and probably never would have been adopted but for the understanding) that it was never to be exerted except in the few specified cases.

From this brief review of the history and contemporaneous exposition of this portion of the Constitution, it is evident that the convention which formed and the people who ratified that great charter of our liberties intended that the regulation of the times, places, and manner of holding the elections should be left exclusively to the legislatures of the several States, subject to the condition, only, that Congress might alter the State regulations, or make new ones, in the event that the States should refuse to act in the premises, or should legislate in such a manner as would subvert the rights of the people to a free and fair representation.

The question now to be determined, however, is one of power, and not the propriety of its exercise. Reference has been made to the proceedings of the forming and ratifying conventions, for the purpose of showing the reasons which induced the adoption of this clause, and the cases to which it was intended to be applied, rather than to negative the ultimate power of Congress to legislate upon the subject. If the power should be conceded to be plenary and supreme, to prescribe the times, places, and mode; to establish the general ticket or district system; to adopt the *viva voce* or ballot form of voting; and, in short, to make all such regulations as should be deemed necessary and proper to the full enjoyment of the elective franchise, still the question arises, whether the second section of the apportionment act is an exercise of this power in a manner contemplated by the Constitution, and binding upon the States.

That act does not district the States, nor provide for an election by general ticket; does not prescribe the mode of voting; does not fix the times, places, or manner of holding elections; does not make such alterations in the State laws, or enact new ones, which would enable the people to elect their representatives. It is entirely nugatory and inoperative without the aid of State legislation; and even with that aid, it has no other force or virtue than that which they impart to it. True, it says that the elections shall be by districts, and that but one representative shall be elected in each district; but how, when, and where the elections are to be held are not provided. These things are all left to the legislatures of the different States; and if those legislatures had not passed the necessary and appropriate laws, no elections could have taken place. All the elections which have occurred since the passage of this act have been held under the authority and in pursuance of the provisions of the State laws.

Every member on this floor is here by virtue of an election held under the authority of the laws of his own State, or he has no legal warrant to a seat in this house. No elections have been held, and none could be held, by virtue of the second section of the apportionment act; for it prescribes no times, places, or mode of holding the elections. It may be said—and, indeed, has been strenuously urged—that by apportioning the representatives among the several States, and declaring that they shall be elected in districts, Congress has virtually *instructed* the State legislatures to carry its mandates into effect, and to enact laws regulating elections in pursuance thereof. But whence does Congress derive its authority to instruct the State legislatures in respect to the manner in which they shall perform the duties imposed upon them by the Constitution? We have searched the Constitution in vain for such a power. The fourth section of the first article certainly does not confer it. That section only vests the power of legislation on this subject primarily in the several legislatures, and ultimately in Congress. The power of the States, in this respect, is as absolute and supreme as that of Congress, subject to the proviso that Congress may change or suspend their action, by substituting its own in lieu thereof. The right to change State laws, or to enact others which shall suspend them, does not imply the right to compel the State legislatures to make such changes or new enactments. Whatever power the legislatures possess over elections, they derive from the Constitution, and not from the laws of the United States. Congress has no more authority to direct the form of State legislation than the States have to dictate to Congress its rule of action. Each is supreme within the sphere of its own peculiar duties; clothed with the power of legislation, and a discretion as to the manner in which it shall be exercised, with which the other cannot interfere by ordering it to be exercised in a different manner. The Constitution contains no grant of power to Congress to superintend and control and direct the legislation of the States. This is not among the enumerated powers, nor can it be implied as necessary and proper to carry them into effect. Congress is invested with authority, coextensive with its power of legislation, to make provision for the execution of its own laws, in its own way, without calling upon the States to come to its aid. Hence there can be no pretext, founded on necessity and propriety, for deriving, by vague implication from some unknown source, this extraordinary power of commanding the States what they shall and what they shall not do. This assumption, if permitted by general acquiescence to ripen into the force of constitutional right, and become engrafted upon the settled policy of the government, would practically subvert the principles of the Constitution, and revive those of the old confederation.

The great radical evil in the articles of confederation, which led to the adoption of the present Constitution, was the constant collisions between the federal and State governments, produced by the laws of the former operating upon the latter in their corporate and sovereign capacities, instead of binding the people individually. The consequence was, that, whenever Congress passed laws requiring the States to furnish their quotas of men, munitions of war, or revenue, or to perform any other act necessary to the defence of the country or the existence of the government, those laws could not be executed—were inoperative—a mere dead letter upon the statute-book, until the several legislatures assembled and gave them life by enacting State laws to carry them into effect. If the laws of the confederation were supposed to be unjust to a particular portion of country, or to operate unequally and oppressively upon particular States, such States refused to make provision for their execution, and thus suspended their operation. Upon such refusal, there was no more power to coerce obedience than there is in the case now under consideration; and the government found itself in the humiliating condition of being without the ability or means of enforcing its own enactments. In this connexion we invite the attention to the following passage in the Federalist, illustrating the practical evils of this ex-

ploded theory, which is proposed to be resuscitated in the second section of the apportionment act:

> In our case the concurrence of thirteen distinct sovereign wills is requisite, under the confederation, to complete the execution of every important measure that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed; the delinquencies of the States have, step by step, matured themselves to an extreme, which has at length arrested all the wheels of the national government, and brought them to an awful stand. Congress at this time scarcely possesses means of keeping up the forms of administration till the States can have time to agree upon a more substantial substitute for the present shadow of a federal government.

To remedy these perilous evils, and to give force, vigor, and vitality to the government, the whole system was changed in the formation of the Constitution by distinctly separating the powers of the federal and State governments—making each supreme in its appropriate sphere, and giving the former as well as the latter the power of executing its own laws, by making them operate upon the people directly and individually without the intervention of State legislatures.

Other valuable improvements were incorporated into the new system, calculated to make it more harmonious and perfect in its operation; but all resting upon that grand fundamental principle, in the absence of which experience has shown that the forms of the government could not be maintained, nor the Union preserved.

There are cases provided for in the Constitution in which the power of legislation is, to some extent, concurrent, or where the laws of the States may be superseded by those of the Union. But we apprehend no instance can be found in which either may direct the legislative discretion of the other, and require enactments to be made in servile obedience to certain prescribed forms.

Congress possesses the power under the Constitution "to establish uniform laws on the subject of bankruptcies throughout the United States," and may exercise it, or not, in its discretion. The Supreme Court of the United States has repeatedly decided, however, that this power is so far concurrent that, in the absence of any legislation upon the subject by Congress, the States may enact bankrupt laws, in such form and with such provisions as they shall deem just and proper, subject to the constitutional restrictions that they shall not impair the obligation of contracts. Notwithstanding the right of the States to legislate upon this subject, it is clear and undoubted that Congress may at any time resume its authority, and suspend the operation of the State laws by the enactment of a general bankrupt law which shall be uniform throughout the Union in pursuance to the Constitution. Numerous other cases may be cited, in which a similar concurrent power is vested in the two governments, with a resulting authority in Congress to supersede the State legislation by the substitution of its own. But will it be seriously contended for a moment that because the general government may suspend the State laws in these cases, it may therefore order the legislatures to enact laws upon the subject of bankruptcies in accordance with certain arbitrary rules established by Congress? The soundness of this principle may be tested by supposing that Congress, instead of passing the late bankrupt law, had contented itself with a simple declaration similar to the second section of the apportionment act—that all laws upon the subject of bankruptcies should be uniform in each State of the Union; that persons might be discharged from the payment of their just debts, upon their own application, without the consent of their creditors, upon the surrender of all their property, except so much as the court should be pleased to allow them to retain, not exceeding three hundred dollars; and that no man should be released from his obligations under any law which did not conform to these abstract principles. Would these rules be valid, and impose upon the States the duty of changing their local legislation so as to conform to the abstractions established

by Congress? Can Congress refuse to exercise a concurrent power conferred by the Constitution, and, in the very act of refusal, prescribe the form of its exercise by the State legislatures? If this cannot be done in a case of bankruptcy, upon what principle is it that Congress may direct the legislative discretion of the States in regard to elections? But let us further test this assumed right by illustrations drawn from the same clause of the Constitution upon which the assumption is founded. That section vests the power of prescribing the times and places as well as the manner of holding the elections, primarily in the State legislatures, and ultimately in Congress. It is the duty of the former to act, and it is the privilege of the latter to suspend or alter their action. Congress has the same control over the time that it has over the manner, and we do not question its right to prescribe either or both under the Constitution. But suppose that Congress had inserted a section in the apportionment act, declaring that the elections of representatives should be held in all the States of the Union on one and the same day without naming the day. The same power which would authorize the Congress to declare that the members should be elected by districts, without forming or specifying the districts, would authorize the provision that they should be elected on the same day without designating the day. If the provision would be valid, and operative, and binding in the one case, it would be equally so in the other; and if the elections held in pursuance of State laws, but in opposition to such a provision, would be void in the one case as they would also be void in the other. The two cases involve the same principle—the right of Congress to refuse to enact laws making provision for elections, and at the same time to establish rules by which the States shall be governed in their legislation. It is apparent that in regard to the time of holding elections such a rule would be inoperative and impracticable, if not absurd. All the States could never agree upon the same day; one would fix one time, and others different times, each to suit their own convenience, and insist that all the others should conform to the time it had established. The members would be elected on as many different days as the States, in their discretion, should prescribe, each for itself; and, like all the members of the present Congress, would demand their seats by virtue of elections held in pursuance of the only laws which prescribe the times, places, and manner of holding the elections. In that case the members from one State would be elected in conformity to the rule established by Congress, and from all the other States in derogation of it. How would the House determine which State had fixed the right, and which the wrong day; and whose representatives had been elected in pursuance of, and whose in opposition to, the uniform rule prescribed by Congress for the government of the State legislatures? What would be the decision of the House when that case arose? It could not reject all; for the members from some one State (nobody knows which) would have been elected in compliance with the rule. Still, all must be admitted or all rejected from the necessity of the case. A similar rule in regard to the places of holding elections, the mode of voting, or the form of making returns, would inevitably lead to the same practical results.

Hence we are brought irresistibly to the conclusion that a fair interpretation of this clause of the Constitution requires that Congress shall either designate the time, specify the places, and prescribe the manner, by law, or leave it to the wisdom and discretion of the several State legislatures.

But it does not necessarily follow from this construction that Congress is compelled to exert all the power conferred in that section, or to refrain from the exercise of every portion of it. We insist upon no such principle. Congress may prescribe the times, the places, the manner, or either of them in its discretion. But if it attempts to control the time, it must designate the day by law; and

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We [illegible] Congress the right to provide by law for the election of mem

bers of Congress in each State of the Union on a certain day, to be named in the act, without prescribing the places or manner of election. The power to designate the places or the manner without specifying the time is equally clear; but whenever Congress assumes the power over one branch of the subject, its legislation must be complete to that extent, so as to execute itself without the intervention of the State legislatures, and the residue must be left to the States to be exercised according to their discretion under the Constitution. So much of the power as shall not be embraced in the legislation of Congress, the Constitution makes it the imperative duty of the States to carry into effect, and constitutes them the sole and exclusive judges of the mode and means best adapted to the end without the interference or control of Congress.

This view of the subject is strengthened and confirmed by the uniform practice of the government from the time of the adoption of the Constitution to the passage of the act under consideration, a little more than a year ago.

If the doctrine contended for in the second section of that act be correct, it is a remarkable fact that, during the whole period of our constitutional history, Congress has never exercised, or claimed the right to exercise, the power of directing the form of State legislation. It is said that, in the exercise of doubtful powers under the Constitution, the safest rule of construction is to be found in the practical exposition of the government itself, in all its various branches and departments where the practice has been uniform, and the acquiescence of the people general. Indeed, it has been judicially determined by the highest tribunal in the land that in such a case the practice establishes the construction so firmly and inflexibly that the court will not consider the question open for discussion or inquiry. If this rule should be deemed sound and incontrovertible, with what irresistible force does it apply to a case where the practice of the two governments has been uniform—the one affirming, the other conceding, by every act of legislation, the correctness of this principle; and where the people have yielded a universal acquiescence, without a murmur or remonstrance, and have sanctioned it at the polls as often as the period of election has recurred.

The resolution of the House, in obedience to which we are now acting, does not authorize or permit us to go into an examination of the expediency, propriety, or relative merits of the general ticket or district systems, or the policy of any other matter connected with the regulation of the times, places, and manner of holding elections. The Constitution provides that "each house shall be the judge of the elections, returns, and qualifications of its own members;" and the instructions of the House confine our inquiries within these limits.

We therefore submit the following resolutions, and recommend their adoption by the House:

Resolved, That the second section of "An act for the apportionment of representatives among the several States, according to the sixth census," approved June 25, 1842, is not a *law* made in pursuance of the Constitution of the United States, and valid, operative, and binding upon the States.

Resolved, That all the members of this House (excepting the two contested cases from Virginia, upon which no opinion is hereby expressed) have been elected in conformity with the Constitution and laws, and are entitled to their seats in this House.

JANUARY 24, 1844.

Mr. GARRETT DAVIS, from the minority of the Committee of Elections, made the following report:

The Committee of Elections having been ordered by the House "to examine and report upon the certificates of election, or other credentials, of the members returned to serve in this House, and to inquire and report whether the several

members of this House have been elected in conformity with the Constitution and law," have examined and considered the matter with which they were charged. The undersigned, as a minority of said committee, ask leave to report for themselves: That they concur in so much of the report of the majority as represents the elections and returns of the members of the House from the States of Maine, Massachusetts, Rhode Island, Connecticut, Vermont, New York, New Jersey, Pennsylvania, Delaware, Virginia, (except two contested seats,) North Carolina, South Carolina, Kentucky, Tennessee, Ohio, Louisiana, Indiana, Illinois, Alabama, and Arkansas, to be constitutional and legal; but the elections in the States of New Hampshire, Georgia, Mississippi, and Missouri, in the judgment of the undersigned, are illegal and void, and the members of the House of Representatives returned from those States are not entitled to hold their seats. We will proceed to give some of the reasons which have brought us to this conclusion.

The 2d section of "An act for the apportionment of representatives among the several States according to the sixth census," provides "that in every case where a State is entitled to more than one representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of representatives to which said State may be entitled—no one district electing more than one representative." The authority under which Congress made this provision is in the 4th section of article 1 of the Constitution, in these words: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may *at any time*, by law, *make* or *alter* such regulations, except as to the places of choosing senators." The second clause of article 6 reads: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the *supreme law* of the land; and the judges in every State shall be bound thereby, anything in the Constitution or *laws of any State* to the contrary notwithstanding." When the law of Congress passed, New Hampshire, New Jersey, Alabama, Georgia, Mississippi, and Missouri had election laws requiring their representatives respectively to be elected by general ticket. New Jersey and Alabama conformed to the law of Congress by modifying their laws, and electing their representatives by single districts; but the other States have adhered to the general ticket, and held their elections in opposition to the law of Congress. The elections of New Hampshire, Georgia, Mississippi, and Missouri must consequently be void, unless the law of Congress is unconstitutional, or from some other cause is inoperative.

The Constitution of the United States forms a government complete in itself. It derives none of its powers from the State governments, but it emanates wholly from a higher source—the people of the United States acting by States; and to conduct its operations, its founders instituted its own agents. The legislatures and governors of the States are invested with a few of its powers; but, in the execution of such powers, those State functionaries are as much the agents of the general government as Congress and the President are in the fulfilment of their appropriate duties. No branch or officer of the State governments can perform any act whatever in the administration of the government of the United States but by virtue of, and in strict conformity to, some express provision of its Constitution. The power of the State legislatures to pass laws to regulate the election of senators and representatives in Congress, and of the governors of the States to fill *pro tempore* vacancies in the Senate, is derived primarily, wholly, and exclusively from the federal Constitution; and, considered simply in the performance of those acts, they are not agents of the State governments, but are organs of the government of the United States. In depositing these powers, they are referred to as legislatures and governors of the States, not to

obtain any necessary or additional authority to the acts which the Constitution requires them to perform, but only to verify the persons with whom it intrusts certain powers, which could as well have been conferred upon any other officers, State or federal, with precisely the same sanctions in their execution. In testing the validity of any laws of the States relating to the election of representatives in Congress, and those elections also, we are to look only to the Constitution of the United States.

Among the fundamental provisions of that instrument are: "The House of Representatives shall be composed of members elected every second year by the people of the several States," &c.; and "The Senate of the United States shall be composed of two senators from each State, chosen by the legislatures thereof for six years," &c. It has been lately assumed that the clause relating to the House of Representatives establishes the general ticket as *the mode* by which its members are to be elected; and this strange position it has been attempted to enforce by a more strange argument, deduced from the one concerning senators. The plain object of these two provisions is to *establish* the body of *electors* of the two houses, and not to prescribe the manner of choosing their members. But the argument is this: that the members of the State legislatures cannot be divided into two classes, and the election of a senator be assigned to each; and as the people of the States are to elect their representatives, they cannot be divided into districts, and those residing in a district be restricted to vote for a single representative, but *all* have the right to vote for *all* the representatives of the State. If such reasoning be entitled to a serious answer, it may be said that senators are not to be chosen by the *members* of the State legislatures, but by the *legislatures;* and the body of the two houses must be convened and organized in general assembly to constitute a legislature. On the other hand, representatives are to be elected, not by the *States*, but by the *people of the States;* and these phrases are to be received as they were universally understood when the Constitution was formed; and the right created by them may be exercised in the form in which ever since, until the present time, it has been recognized to exist by all. The *people* of the States, respectively, then elected, as they now do, the most numerous branch of their legislatures; yet the whole people never voted for all the members of which it consisted, nor, indeed, for as many candidates. The position that the *House of Representatives must be chosen by all the people* of the several States, would prove too much for the purposes of its advocates. If the mode of electing representatives is to be deduced from this clause of the Constitution, it establishes one much beyond the general ticket—it results, inevitably, that *all the people* of a State must not only vote for as many persons as it may be entitled to have representatives, but *each representative* must be *chosen* by the *whole people*. A majority, barely more numerous than the minority, voting by general ticket for as many persons as the number of representatives of a State, would not be *all the people* of such State *voting* for, much less *choosing all her representatives*. The absurdity of the argument would not stop here. *All the people* of every State would have the right—yea, would be *bound—to choose "the House of Representatives;* that is, the entire aggregate of representatives from *all* the States; and a constitutional house could not be differently formed. There would yet be other difficulties, some of which could not be surmounted. Every voter would be required to distribute his suffrage among the States to as *many individuals* of each as they would be entitled severally to representatives. That every man voting in *any State* would be bound to vote for *every State*, is the necessary sequence of this argument, notwithstanding the same clause of the Constitution provides further, "the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature;" and these qualifications, by the different State constitutions, are made various and conflicting. But the single office of this prov

Constitution is to ordain and to describe the body of electors by which the House of Representatives is to be chosen; and a law distributing representation among the people of the States, by single districts, would not infringe their constitutional right of suffrage. This position is made immovable by precedent and authority. Six of the original States established single districts for the election of their representatives to the first Congress; a few years after, we see the same equitable rule governing the elections of three-fourths; and about the same proportion have ever since adhered to it. No member of the convention which formed the Constitution, no cotemporary exposition of it, ever even intimated an opinion that the general ticket was the only constitutional mode of electing representatives. That is one of the new-born dogmas of the day, which cannot abide the test of either reason or authority.

The 4th section, before quoted, in these words, "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at *any time*, by law, *make* or alter such regulations, except as to the place of choosing senators," is the only provision in the Constitution which expressly establishes and invests any authority to legislate upon the subject of the election of representatives and senators; and if *it* do not confer the power to determine whether the members of this House shall be elected by districts or by general ticket, then the State legislatures have no jurisdiction over that part of the matter; and they have continuously, from the origin of the government, but without question, usurped it. But the language employed is comprehensive, and does give, as was intended, both to the State legislatures and Congress, ample authority over this subject. If it were true, as has been contended, that the power to regulate "the manner of holding elections" does not comprehend that of establishing that they shall take place by districts, or general ticket, how have the State legislatures, at their pleasure, set up the one mode or the other? The Constitution will be searched in vain for any other warrant to *them*. It will not be seriously contended that the States have an *implied power* to conduct this or any other operation of the general government. The implied powers result from the express; and the State legislatures are invested with no express power, from which this important implied one will inure to them. It is strictly of a legislative character. The Constitution provides that "Congress shall have power to make all laws which shall be necessary and proper for carrying into execution" the powers expressly enumerated and conferred upon it, "and all other powers vested by it in the government of the United States, or in any officer or department thereof." If this first clause of the 4th section of article 1 does not give, *sub modo*, both to the State legislatures and to Congress the authority to direct that the members of this House shall be elected by districts, or by general ticket, then that regulation belongs to Congress exclusively, as an implied power.

In giving this Construction of the constitution, we but conform to that from which there was no dissent when it was formed and adopted by the States. Mr. Madison, in his speech in convention, when this clause was under consideration, says: "This view of the question seems to decide that the legislatures of the States ought not to have the uncontrolled right of regulating the times, places, and *manner* or holding elections. These were words of *great latitude*. It was impossible to foresee all the abuse that might be made of the *discretionary power*. Whether the elections should be by ballot or *viva voce;* whether the electors should assemble at this place or at that place; should be divided into districts, or all meet at one place; should *all vote* for *all the representatives*, or all in a district vote for *a member allotted* to that district;—these, and *many other points*, would depend upon the legislature, and might materially affect the appointments." "It seems to be as *improper* in *principle*, though it might be less *inconvenient* in *practice*, to give to the State legislatures this great authority over

the elections of the people in the general legislature, as it would be to give to the latter a like power over the election of their representatives in the State legislatures."

Mr. Hamilton devoted three numbers of the Federalist to this provision of the Constitution; and in his luminous exposition of it are found these passages: "They have submitted the regulations of elections of the federal government, in the *first instance*, to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory. But they have reserved to the national authority a right to *interpose* whenever extraordinary circumstances might render that interposition necessary to its safety." "If the State legislatures were to be invested with an *exclusive* power of regulating these elections, every period of making them would be a delicate crisis in the national situation, which might issue in *dissolution* of the Union, if the leaders of a few of the most important States should have entered into a previous conspiracy to prevent an election." "But there remains a positive advantage which will accrue from this disposition, and which could not as well have been obtained from any other; I allude to the circumstance of *uniformity* in the time of elections for the federal House of Representatives."

Mr. Hamilton, in the convention of the State of New York, also, which adopted the Constitution, held this strong and precise language: "The natural and proper mode of holding elections will be to *divide* the States into *districts*, in proportion to the number to be elected. This State will, consequently, at first be *divided into six; one man from each district* will probably possess all the knowledge gentlemen can desire."

Patrick Henry had the same understanding of the nature and scope of this power. In a speech in the convention of Virginia, he said: "Congress is to have a *discretionary control* over the time, place, and manner of holding elections. The representatives are to be elected, consequently, when and where they please. As to time and place, gentlemen have attempted to obviate the objection, by saying that the time is to happen once in two years, and that the place is to be within a particular district, or in the respective counties. But how will they obviate the danger of referring the *manner* of election to Congress?" "The power over the manner admits the most dangerous latitude; they may modify it as they please."

This clause attracted much attention, and received deliberate consideration in most of the conventions of the States; and the matured and collective action of a majority of them, embracing then all the *largest* members of the confederacy, resulted in their severally recommending a modification of the power with which it invested Congress, to be adopted as part of the Constitution. That proposed by Rhode Island is in these words: "That Congress shall not alter, modify, or interfere in the times, places, and manner of holding elections for senators and representatives, or either of them, except when the legislature of any State shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same; or in case when the provision made by the State is so imperfect as that no consequent election is had, and then only until the legislature of such State shall make provision in the premises."

Massachusetts recommended an amendment in these words: "That Congress do not exercise the powers vested in them by the fourth section of the first article, but in cases when a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations *subversive of the rights* of the people to a free and *equal* representation in Congress, agreeably to the Constitution."

Pennsylvania presented her modification of this provision thus: "That Congress shall not have power to make or alter regulations concerning the time, place, and manner of electing senators and representatives, except in case of neglect or refusal by the States to make regulations for the purpose; and then only for such time as such neglect or refusal shall continue."

The States of Virginia and North Carolina each proposed to modify this clause as follows: "That Congress shall not alter, modify, or interfere in the times, places, or manner of holding elections for senators and representatives, or either of them, except when the legislatures of any State shall neglect, refuse, or be disabled by invasion or rebellion, to prescribe the same."

The amendment proposed by New Hampshire reads: "That Congress do not exercise the powers vested in them by the fourth section of the first article, but in cases when a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and *equal* representation to Congress; nor shall Congress in any case make regulations contrary to a free and equal representation."

South Carolina, also, presented a modification in these terms: "And whereas it is essential to the preservation of the rights reserved to the several States, and the freedom of the people, under the operations of a general government, that the right of prescribing the manner, time, and places of holding the elections to the federal legislature should be forever inseparably annexed to the sovereignty of the several States, this convention doth declare that the same ought to remain, to all posterity, a perpetual and fundamental right in the local, exclusive of the interference of the general government, *except* in cases where the legislatures of the States shall refuse or neglect to perform and fulfil the same, according to the tenor of the said Constitution."

None of these proposed amendments were incorporated into the Constitution; and this fourth section was permitted to continue just as the members of the convention formed it, and as Madison, Hamilton, and Henry expounded it. *All* the power which it bestowed upon Congress *remains;* the jealous apprehensions with which the State conventions regard it are gone with the other illusions of the day. But the unambiguous language in which it is expressed; the concurring understanding of its nature and extent, by all the great men who composed the conventions which framed and adopted the Constitution, and the restrictions to which seven of those conventions proposed to subject it, give a key for its clear and full analysis. It confers all necessary authority over the subject, by the terms "to regulate the times, places, and manner of holding elections of senators and representatives." It gives to the legislatures of the States and to Congress, both, the *power* to make these regulations; and to Congress, also, the further distinct and important power *to alter at any time* such regulations as the States may make. It *commands* the legislatures of the States to execute the power with which they are invested; but it *confides* to Congress the *discretion* to *exercise*, or not, either of the powers intrusted to it, at all times. No legislation of the States can prevent Congress from acting on this subject, either in the form of *making* these regulations, or *altering* those of the State legislatures; nor can the States *qualify* or *circumscribe* that action in the one mode or the other, whatever it may be. But Congress, by executing its power to *make* these regulations, may exclude, and wholly put an end to, the jurisdiction of the State legislatures; or, in exercising its other power, *to alter* the State regulations to *any extent*, it may allow that jurisdiction to operate within as *large* or *small* limits as it may adjudge to be proper; or it may leave to these legislatures the exercise of all power over the subject, by itself abstaining from all legislation relating to it. But when Congress does legislate, either to *make* these regulations, or to *alter* such as the State legislatures may have prescribed, just so far as it does act, its authority is absolute, paramount, and exclusive. This character would be imparted to its action by the 2d clause of the 6th article, before introduced: "This Constitution, and all laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land," &c. In addition, the discretionary power with which Congress is invested *to make* these regulations, or to *supervise and alter* those of the State legislatures *at all times*, stamps its legislation in the premises with an overruling supremacy.

But, the main question in deciding the right of the representatives from New Hampshire, Georgia, Mississippi, and Missouri, results from the power of Congress *to alter* these election regulations of the State legislatures; and that question is: Does the law under consideration alter those regulations? "To alter" is a term of large meaning, and, in its application to this subject, will include any variation in substance whatever. It imports a greater power than any other term, except "to make" or its synonyme. Whatever the change—whether by adding to, striking from, or modifying—it is an alteration. The State legislatures have an implied power *to alter* their election regulations, but the Constitution gives to Congress the express power *to alter* those same State regulations; and as the express power of Congress is as extensive as the implied power of the State legislatures, any alterations which they *can* make in their regulations, whether of time, or place, or manner, Congress *may at any time make* with precisely the same effect; for it would be preposterous to assume that an alteration made by the State legislatures would be valid and operative, but being made by Congress, though in the same terms, is futile and void.

Some of the States have passed laws regulating their election of senators; others have not; and yet the constitutionality of the regulations of the latter States for holding their election of representatives has not been, and cannot be questioned. Such States as have no regulations by law for their senatorial elections may make *them* also: so Congress could pass a law regulating the election of senators generally; for that would be an alteration of the election regulations of some of the States, by adding to them. Congress could thus establish uniformity in the mode of electing senators, by enacting a law requiring both branches of the State legislatures to choose by their aggregate vote, and might confine its action to that, or any other particular regulation for the election of senators. That principle has generally prevailed in senatorial elections; and, in consequence of different parties having frequently the ascendency in the two houses of many of the State legislatures; and the difficulty and delay in choosing senators, it may become necessary for Congress to embody this principle into the election regulations, to secure the uninterrupted representation of the States in the Senate.

The State legislatures might alter their existing regulations relating to time, or place, or manner, confining their action to either one; and leaving intact, and in full force and effect, all relating to the other two; and a similar alteration, made by a law of Congress, would have the identical same operation. The State of Kentucky elects her representatives on the first Monday in every August before the first session of each Congress, as now fixed by law; and she has all needful regulations of place and manner. If her legislature, now in session, were to pass a law with the single provision that, hereafter, her elections should take place the first Monday in October next before the beginning of each term of Congress, it would surely make an alteration in her election regulations in point of time; and her subsequent elections, as of course, would be held accordingly. All the States have their complete regulations of time, place, and manner; but in many of the States the time is variant. If Congress were now to pass a law providing merely that the election of representatives in all the States should be held on the first Monday in every August before the beginning of each congressional term, it would alter the laws of every State whose time was in conflict; and elections would take place on the day named by Congress, but in all other respects in pursuance of the regulations made by the State legislatures.

In the case put, it is true every State would have all needful election regulations, with the residue of which, after changing time where it might clash, or any other feature whatever for which it might provide, the law of Congress would be incorporated, and make a harmonious and operative system. But the fact that the election regulations of the States had been so constructed that such

a law of Congress could produce a corresponding change, and then amalgamate with them and form a complete and practicable system, could neither give nor add to the validity of the law; nor would the absence of such a state of case render it less constitutional, or its obligation less perfect. If the converse proposition were true, the obligatory force of the laws of Congress upon this subject would not only depend upon the nature of their own provisions, but upon the contingency of the particular forms of the State regulations. This argument may be further enforced by illustration. Suppose Iowa should be admitted into the Union as a State during this Congress; previous to which, Congress should pass a law establishing uniformity in the time of holding the election of the members of the House. She, not then existing as a State, could have no regulations of time, or place, or manner, with which the law of Congress could commingle; but who can doubt its potential force, and that it would operate upon her when she should come into being? Who will not admit that, if her legislature were to prescribe a different time, this particular regulation would be void, because of its conflict with the law of Congress? But the young State, loyal to the Constitution, would, doubtless, respect the law of Congress, by omitting any regulation of time, and would prescribe all of place and manner that might be necessary, and then quietly elect her representatives on the same day with every other State of the Union. The constitutionality of all laws depends upon their own provisions, and their own intrinsic effect; and to decide that point, it is only necessary to compare the law with the Constitution. A law not in opposition to the Constitution, it is difficult to conceive to be an unconstitutional law, and yet, the act of Congress requiring elections of representatives to be made by single districts is resisted as an *unconstitutional law*, though admitted, at the same time, that it is not repugnant to, or inconsistent with, the Constitution. On the contrary, it is expressly conceded that Congress has the undoubted power to provide for the *whole manner* of holding such elections; and that if it had proceeded to arrange all the States into districts, and to make all other necessary regulations of manner, the entire law to that extent would have been constitutional, binding, and operative. The objection is, not that Congress has exercised an *unconstitutional* power; but that it has defectively executed a *constitutional* power, by not having done enough. The law cannot be disregarded, therefore, as unconstitutional; but whether it can be considered as a nullity, and therefore having no obligation upon the State legislatures, is a different, but the true and only question. The opponents of the law prove that, of itself, it is inoperative—unavailable—cannot be executed without auxiliary State legislation, which Congress has no power to command their legislatures to furnish; and argue, therefore, that the law is unconstitutional—is a nullity. This conclusion by no means follows from the premises; and the assailants of the law *artfully* seek to try it by a *spurious test*—its own capability of being executed. Whether *proprio vigore* it can be put into practical operation, is not the *principle* by which its obligation upon the State legislatures is to be determined; it may want that property, and yet by no means be a nullity. The only touchstone by which this law of Congress can be tried is, whether it amounts to an alteration of the regulations of the manner of holding elections of representatives that have been prescribed by the State legislatures; and the affirmative of this proposition is so plainly true, that any denial of it would almost seem to be a subterfuge. This second section of the last apportionment act is to be considered precisely as though it had been passed by all the State legislatures themselves; as any alteration of their own laws on this subject which they can make, Congress may at all times make. The State of Mississippi elects by general ticket. Were her legislature at its next session to pass a law with the single provision, that for the future her elections of representatives should be by districts, each district electing but one representative, such a law would unquestionably *alter, repeal* her general ticket system,

although it omitted, whether from wilfulness or inadvertence, to constitute the proper districts. An election by general ticket would be against her existing law, and she would continue without representatives in Congress until her legislature should again convene, and remedy its defective legislation. Suppose, after passing the law, the house of representatives of Mississippi should pass a law dividing the State into single congressional districts, in which the senate should not concur, and it was to fail by disagreement of the two houses; that state of things would not abstract anything from the effect of the first law, and the abrogation of the general ticket would still be complete. The law of Congress has just the same effect in all the States where the general ticket prevailed, as the law of Mississippi would have in that State. But let us present the argument, that this second section, providing for districts, not being in a form to be executed, is therefore a nullity, and of no effect, in another point of view. The 4th section of the Constitution—"The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators"—cannot be executed or put into practical operation without extensive legislation, State or national; and nobody will contend that it is a nullity. Suppose the convention had extended this provision of the Constitution by adding these words: "but, for the election of representatives, each State entitled to more than one representative shall be divided into districts, and each district shall elect but one representative;" would such a clause be a nullity, and not be obligatory on the State legislature? As a part of the Constitution, this second section would have to be conformed to by the State legislatures, all will admit; and yet there it could of itself be no more executed than as a provision in a law of Congress. In both positions, it would require legislation either on the part of the States, or of Congress, to give it practical effect. Because such a regulation standing alone could not be executed, does not, then, prove it to be a nullity. Why would the State legislatures be bound by it, and observe it as a clause in the Constitution? Because it would be a part of the supreme law of the land, and have a paramount obligation. But it is a law of Congress, admitted by everybody to be made in *pursuance* of the Constitution, which declares that such laws also shall be the supreme law of the land; and its obligation is paramount to all State authority and all State laws, and their legislatures are therefore bound to conform to it.

The 1st section of the last apportionment act provides, "That from and after the 3d day of March, 1843, the House of representatives *shall* be composed of members elected agreeably to a ratio of one representative for every seventy thousand six hundred and eighty persons in every State, and one additional representative for each having a fraction greater than one moiety of the said ratio, computed according to the rule prescribed by the Constitution of the United States;" and the same section then proceeds to declare, by names and numbers, how many representatives each State shall elect. No person has impugned the constitutionality, validity, or obligation of this part of the law; and yet, of itself, it is equally incapable of being executed as the second section. Both were framed with a view to, and both require, auxiliary State legislation to give them effect; and the one is just as mandatory upon the State legislatures as the other. Both are equally restrictive upon the discretion of those legislatures; and they are under the same constitutional obligation to conform their legislation to the terms and provisions of each. Similar laws of Congress in relation to the House of representatives, and also to electors of the President, have been respected by the States for more than fifty years, and were never demurred to as being either a nullity, or in the nature of a mandamus upon their legislatures. All the State legislatures have co-operated in making effective the first section of the law, by exactly squaring their legislation with it,

even to the sanction of its novel principle of giving a representative to the fraction of a ratio.

But the force of this analogy is attempted to be evaded, by assuming that all the authority of Congress over the ratio of representation is exhausted by this first section, and that it is a case of complete execution of constitutional power. The constitutionality of the previous laws of Congress apportioning representation has never been doubted; but be that as it may, the wildest opponent of this law will not contend that it was competent for the State legislatures to refuse to pass laws necessary to carry into execution those apportionment acts, on the ground of their unconstitutionality. Nevertheless, when each of those laws passed, there were several States which had a fraction of population greater than one-half of the ratio; and yet, until the last apportionment, no State was ever allowed a representative for such fraction. The power of Congress, then, over the ratio and representation in the House, was never before fully executed. The State legislatures cannot, therefore, take the ground that Congress has but partially executed its power in the passage of a law, to justify them in their refusal to perform a constitutional duty.

But, besides, the argument of a partial or defective execution of power has no application to the present case. The Constitution gives to Congress *alternative* powers, and it is not *required* to execute *either* of them; but whether it will exercise *either*, and the extent of its exercise of its power *to alter* the regulations of the States, and the *time* when it will exercise the *one* or the *other*, are all confided by the Constitution to its sound discretion. At one session, Congress might alter the State laws as to the times of holding elections; at another, it might in the same way regulate the places; and at another the manner; and all would be constitutional and obligatory. So Congress might now pass a law that, in all elections of representatives, the candidates receiving a plurality of votes cast should be duly elected; the next Congress might declare that votes should be given by secret ballot, or *viva voce;* and a succeeding Congress might regulate all the remaining particulars of manner; and these laws would each be constitutional and valid. It is not necessary, then, to make a law constitutional, that the power of Congress be exhausted. The argument against this law, that it is a mandamus upon the State legislatures, which they are not bound to obey, and therefore it is inoperative, and consequently a nullity, would seem to result from an indistinct and confused perception both of the nature of the power of Congress, and the duty of the State legislatures in connexion with this subject. It is said with emphasis, but most untruly, that Congress cannot limit the discretion of the State legislatures, or prescribe the form of their legislation. Congress may, *at any time*, make all these regulations of time, place and manner, and thus exclude the State legislatures from all authority over the subject. It may *at any time* regulate place, and in that way limit the discretion of the legislatures, and prescribe the forms of their legislation to the time and manner. It may regulate time, or manner only; or under the head of manner, it may declare the way in which votes shall be given; or it may change, where it prevails, the majority principle to that of the plurality. In these, and other modes, Congress might restrict the discretion of the State legislatures, and hedge in the forms of their legislation, and its enactments would be constitutional and binding; they would not be in the nature of mandamus, and the obligation of the State legislatures to prescribe all other necessary regulations would be imperative.

This power of Congress to alter the laws of the States is isolated. It is confined to their regulations of the times, places, and manner of holding congressional elections, and extends to no other class of their legislation; but the authority of the States over this complex matter the Constitution makes subject at all times to the *freest exercise* on the part of Congress of its power *to alter* these State laws. When Congress acts, there are not two distinct and inde-

pendent systems of legislation; but, by the force of the Constitution, it becomes one both of blended jurisdiction and legislation; and any alteration it may make of the State laws has the identical effect it would have if made by the State legislature. The State legislatures, then, holding their power subordinate to this untrammelled authority to alter on the part of Congress, they must submit not only to the literal naked alteration itself, but to all legitimate consequences. When Congress makes any alteration whatever, the duty to be performed by each State legislature is the same it would have been had the alteration been made by itself. The system is simple and harmonious. If Congress pass a law which, either in terms or effect, amounts to an alteration of the State regulations to its full extent, the latter, by operation of the Constitution, gives place, and the law of Congress is substituted. If this process leaves the mixed regulations complete and practicable, they go into operation and control future elections; but if others be necessary, it is the constitutional duty of the State legislatures to prescribe them. The law of Congress abolishes the general ticket wherever it had existence. The States, in the fulfilment of the general and absolute injunction of the Constitution upon them to prescribe all these regulations, subject to any and every alteration Congress may from time to time make, are bound to make such other regulations as they would if the act of Congress were the first section of their own law. The Constitution of the United States, (which every member of the State legislatures swears to support before he enters upon his duties,) and not the law of Congress, is the mandamus which, in silent but impressive language, perpetually holds all to the performance of this important duty. It is true the State legislatures may fold their arms and refuse to pass laws in aid of this provision of the law of Congress—as they may refuse to establish *any regulations* of time, or place, or manner; but, because they may determine thus to disregard the Constitution, it surely forms no jurisdiction for their greater outrage of attempting to nullify a law of Congress.

Another objection to this law, and one much relied upon, is its vagueness. It is a principle of sound sense and universal application that a law so vague as to have *no meaning*, or to leave its meaning altogether doubtful, will have no obligatory force; and if this law of Congress be of that character it certainly is a nullity. We concede it must be so precise and intelligible as to inform the State legislatures what is its meaning, and thus enable them, by looking to the law alone, to perform their duty under it. This is all that reason would require; and to demand any more would be to qualify and to limit the power of Congress to alter the regulations of the States when it is conferred in its *utmost latitude;* and if the legislatures have the right to shackle it with this qualification, they may with any others. The only and the very plain duty of the legislatures under this law is to divide their States into single districts. The purpose of Congress to exclude the general ticket system, and to introduce in its stead the single district principle, is spoken in distinct language. If this section were a clause in the Constitution, it would be intelligible enough; it is less comprehensible, because it is a provision of the law of Congress. Were Congress to pass a law merely declaring that all elections of representatives should be held on the same day, it would want the requisite certainty; because the State legislatures, looking to the *law only*, would not know what day to designate and in what form to pass their laws. The same objection would exist to a law of Congress attempting to fix places without naming them. The vagueness and uncertainty in these laws, instead of producing uniformity, would cause only confusion and discrepancy in the legislation of twenty-six States of independent legislatures. But this much-mooted section is invulnerable to all such objections.

It is further objected to the exercise of this power that it has never before been attempted. Fractions of population below the ratio were never allowed a

representative until last Congress. Time nor place of holding elections has never been regulated by Congress; but all concede that they may be. The party opposed to this law has presented to the consideration of this Congress a bill to regulate the time of electing both representatives and electors of President; and yet this argument of forfeiture for *non user* would deprive Congress of all power over the time, place, and manner of congressional elections, and the time of choosing electors, as it has heretofore left the whole to exclusive State legislation. This argument is not entitled to be reasoned.

Among the great variety of grounds upon which this law has been resisted, it is urged that in some of the States there was no session of the legislatures intervening its passage and the times of holding their elections at which the State could be districted. We cannot conceive how that matter can be brought to bear on the validity of the law. Its constitutionality and obligation are in no way connected with State laws on the subject, much less with the times of holding their elections; and the law is to have its effect independent of all such considerations. But as an argument of inconvenience it has very little force. About half the States hold their elections during the year preceding the beginning of the congressional term; the other States during the previous year. Congress could not at any time pass such a law, without causing some inconvenience to some of the States; but the least amount would be produced by passing it at the first session. This law was enacted during the first session of the last Congress; and between its passage and the commencement of the present session, it is believed, there was not a State legislature which did not hold a session. It would then, in truth, have caused no inconvenience or additional expense to any of the States to have formed the proper districts; the only consequence would have been, throwing their election of representatives from one year to the succeeding one. But if an extra session of the legislatures of two or three States had been rendered necessary, it is no more than what has often occurred in giving effect to the laws for apportioning representation.

It is true that this section does not name the laws of any of the States, or in terms alter any of their provisions; nor is it necessary for any effect that it should. Besides, this form is more respectful to the State authorities. The legislatures of some of the States incorporate into their laws regulating the election of representatives a general principle. Congress, possessing the same power as the legislatures to alter such laws, enacts that a different and incompatible principle shall prevail; and the constitutional provision immediately applies, and gives the latter an exclusive, overruling, and paramount authority. The alteration of the State law is as completely effected as if Congress had provided for it in express and precise terms—as if the State legislature itself had made the alteration. This is a common form of legislation. A law is in existence, and another is passed with conflicting provisions; it is a maxim of universal law, that, so far as they are repugnant, the latter supersedes, *repeals* the former. A large proportion of the laws of all the United States are modified, amended, and repealed in this manner; the American people are taught it every day, both by legislative example and judicial recognition.

The pending bill, before adverted to, to establish uniformity of time in the election of representatives and presidential electors, is properly enough in this same form; but it cannot be executed of itself, if it should become a law, without auxiliary State legislation; yet it would not be a nullity. It restricts the *discretion* of the State legislatures, and *prescribes the form* of their laws, by excluding time; and still it would not be in the nature of a mandamus. It, like the law providing for single districts, would be constitutional; and the force of the Constitution, aided by the virtue and patriotism of the American people, would compel the requisite State legislation to make both effective.

The wisdom and practical good sense with which the Constitution is so replete stand forth conspicuously from this section. The power *to make* these election

regulations was conferred upon Congress, to provide for the *exigence* of any of the States refusing, or being unable, from any cause, to prescribe them; and thus a security was established against the government coming to an end, for the want of a Congress constitutionally elected. But the State legislatures might (as many of them have) abuse this power. The general ticket has often been resorted to; districts to elect two, three, and four members have been frequently formed; and even the constituent parts of a single district have been changed—and all to give an undue advantage to the dominant faction in the different legislatures. The regulations of the States have ever been discordant, and some of them operating with flagrant injustice. This will be strongly exemplified by an existing case. Pennsylvania has elected by single district; New Hampshire by general ticket. Pennsylvania, being the second largest State in the Union, has twenty-four representatives; New Hampshire, being one of the small States, has but four. The rule that prevails in Pennsylvania has divided, or nearly divided, her representation politically; whilst that of New Hampshire has elected her entire delegation of the same party. The consequence is, that on nearly all the great political questions which divide the opinion of this nation, New Hampshire, probably, has four times, certainly two-fold, as much power, in the present House, as Pennsylvania. Such contrariety of State legislation upon this subject (disturbing the fundamental principle of equal representation) has existed from the adoption of the Constitution. Many States of diversified and antagonist interests and politics, and each having an independent legislature, would have always, in a greater or less degree, discrepant and unjust election regulations. The establishment of important principles (just, wise, and applicable to all of them, and securing the rights of all) is the character of the supervision which Congress ought to exercise over this State legislation. The minor features and the details should be left to the more accurate local information of the State legislatures. This complex power, thus to be distributed, would, doubtless, secure its more convenient and acceptable, as well as its more just and proper execution, than if it were given up wholly, either to the State legislatures or to Congress. That the convention expected it to be thus exercised, is proved by the authority of Mr. Madison. When the Constitution was before the convention of Virginia for its adoption, Mr. Monroe interrogated him concerning this clause thus: "He wished to know why Congress had *ultimate control* over the time, place, and manner of the election of representatives," &c. Mr. Madison responded upon this point: "It was thought that the regulations of time, place, and manner of electing representatives should be uniform throughout the continent. Some States might regulate the elections upon principles of equality, and others might regulate them otherwise." "It was found impossible to fix time, place, and manner of the election of representatives in the Constitution. It was found necessary to leave the regulations of these, in the first place, to the State governments, as being the best acquainted with the situation of the people, subject to the *control* of the general government, in order to enable it to produce *uniformity*, and to prevent its dissolution. And, considering the State governments and the general government as distinct bodies, acting in different and independent capacities for the people, it was thought that *particular regulations* should be submitted to the former, and the general regulations to the latter," &c.

The undersigned think that the following propositions are clearly made out: That this law is not unconstitutional, because there is nothing in it in opposition to the Constitution; that it is not void, in consequence of not being a full execution of the power of Congress, because the Constitution permits Congress to exercise so much of this power at all times as it may think proper; that it is not a nullity, because it is a clear, intelligible, and substantive alteration of the State laws, which Congress had the right to make; and it plainly and distinctly, by its provisions, informs the State legislatures what they are to do to give it

practical effect; that the State legislatures are commanded by the Constitution, and bound by their oath to support it, to divide their States respectively into districts, or to prescribe any other needful regulations to give this law its effect; and that the general-ticket regulation of New Hampshire, Georgia, Mississippi, and Missouri, and the election of their representatives, being in opposition to this law of Congress, which is a part of the supreme law of the land, are void and of no effect.

This law has received the sanction of both houses of Congress, and been approved by the Executive. In the forms of its enactment, as well as in its provisions, the Constitution has been strictly regarded. The question now is, not whether it should have passed, but, being a part of "the supreme law of the land," whether a branch of the power which made it will uphold it, or lend itself to aid certain States in its summary and unconstitutional overthrow. If the law were unwise—nay, mischievous—it would still be the stern duty of the House to do its part to enforce it; and the only remedy would be its repeal. But, were its policy now in issue, it could be triumphantly maintained—yea, that the passage of such a law has been too long delayed. It is obvious that it is about as much as Congress should do in relation to manner; and that the formation of districts, the appointment of officers, and other particular regulations of manner, were properly left to the State legislatures. It could be demonstrated that the election of representatives by single districts would secure a larger and more diffusive representation of the people than is attainable in any other mode; that, by the general ticket, six of the largest States would elect 119 members; and seven of the free States, 113 members of the present House—and thus but little more than one-half of their voters, forming about one-fourth of the freemen of the United States—would wield the popular branch of the government; that the general ticket would give the selection of candidates, and thus the election in fact, into the hands of a few active, forward, and bold spirits, and the people would only have the privilege of ratifying their caucus decrees; that this mode, in truth, does not give a representation of the people, but only of State majorities, and silences wholly the voice of all minorities, though in numbers barely distinguishable from the dominant majority; that it would practically change the government, though its form and theory might continue, by making the popular branch, like the Senate, a representation of the States—unlike the Senate, too, as the States would not here have equal power, but in proportion to numbers, whereby a mere majority of the people of the State of New York would have more positive power than Delaware, Rhode Island, New Hampshire, Connecticut, Michigan, Arkansas, Louisiana, Mississippi, and Missouri, though in the last House her representation was so divided as to give her no more than Rhode Island on all political questions; that, under the next ratio, six of the free States—Massachusetts, New York, Pennsylvania, Ohio, Indiana, and Illinois—forming a perfect cordon, in perpetual and increasing conflict with some of the institutions of the southern States, would unquestionably have a majority of the House of Representatives; and they might at any time dissolve the government by seceding from the House; that the safety of the small and slaveholding States is in the prevalence of the single district principle, which would so distribute the representation of the large States among contending parties as practically and materially to reduce their strength; and that the example of one or two of the large States, in adopting the general ticket, would certainly and speedily allure all the others from the division and weakness of districts, to the adoption of a system which would preserve their indivisibility and strength—such a change having already taken place in the election of presidential electors. These great, manifold, and dangerous abuses, are not merely ideal. Some of them have occurred; the others are in the course of events, without measures of vigorous precaution. This law of Congress, [illegible]ibly executed, would be a measure of decided, if not complete efficiency.

It is wiser, too, and inconceivably less difficult to prevent, than it is to correct great political evils.

There has been seldom presented for the decision of any branch of the government a question of equal magnitude, or more abiding and permanent interest; and it may be said, without exaggeration, that the nation is anxiously awaiting the decision.

We could not contemplate the House of Representatives assaulting and declaring a law of Congress to be void and of no effect without the most gloomy forebodings. The case which would authorize such an interposition must be flagitious indeed; but the American people might readily believe that the nullification of this law by the present House may be portentous of many such *assumed* cases. If this great, wise, just, and sanitary measure is thus to be struck down, what power can stay the same arm, when, in the course of the successive rise and fall of parties, it may aim blows at other laws equally obnoxious to a daring, dominant, and unscrupulous faction of a day? It is true the House is not the tribunal which is to pass on the validity of many laws; but, with all the elements of opposition and resistance that perpetually exist to those the most wholesome, none can have their proper moral force, and all may be defied, when the popular branch of the law-making power desecrates itself by joining a league for their subversion. What a fearful opening would such a state of things make for able and reckless demagogues—for profligate and desperate factions? How distinctly would it mark the corruptions of politics, the decay of national morals, and the impending dissolution of our institutions! Our abiding trust is that the people will arouse, throw their betrayers from them as "the lion shakes the dew-drops from his mane," and snatch the government and country from this hopeless abyss.

The minority of the committee offer the following resolutions as a substitute for that recommended by the majority of the committee:

Resolved, That Messrs. Edmund Burke, John P. Hale, Moses Norris, jr., and John R. Reding, sitting members of the House of Representatives from the State of New Hampshire; Messrs. Edward J. Black, Absalom H. Chappell, Howell Cobb, Hugh A. Haralson, John H. Lumpkin, Alexander H. Stephens, and William H. Stiles, sitting members from the State of Georgia; Messrs. William H. Hammett, Robert W. Roberts, Jacob Thompson, and Tilghman M. Tucker, sitting members from the State of Mississippi; and Messrs. Gustavus M. Bower, James B. Bowlin, James M. Hughes, John Jameson, and James H. Relfe, sitting members from the State of Missouri, in the present Congress, not having been elected in pursuance of the Constitution and law, their seats, severally, are hereby declared to be vacant.

Resolved, That the Speaker of this house transmit to the chief executive officer of the States of New Hampshire, Georgia, Mississippi, and Missouri, respectively, a copy of the preceding resolution.

GARRETT DAVIS.
WILLOUGHBY NEWTON.
ROBERT C. SCHENCK.

The debate on this subject occupied a large part of the session. The report of the committee was not formally agreed to, but it was voted, by a decided majority, that each member elected by general ticket was entitled to his seat. The principles involved are fairly stated in the reports given, and it is unnecessary to quote from the arguments made in the House. A full index to the entire debate will be found on page 16 of vol. 1, part 13, and page 3, part 2, vol. 13. Volume 13, parts 1 and 2, contains the entire debate. The votes upon the right of each member (elected under the general ticket system) will be found on pages 278, 279, 280, and 283, vol. 13, part 1.

TWENTY-EIGHTH CONGRESS, FIRST SESSION.

GOGGIN *vs.* GILMER.

The acts of proper officers acting within the sphere of their duties must be presumed to be correct unless shown to be otherwise.

There was no contest in the House upon this case.

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 26, 1844.

Mr. ELMER, from the Committee of Elections, made the following report:

That the fifth congressional district of Virginia consists of the counties of Bedford, Amherst, Nelson, Albemarle, Orange, Madison, and Greene. The polls, it appears, were closed on the 27th day of April last (the day fixed by law for holding the election) at all the places of voting in the aforesaid counties, except at the court-house and Robinson's precinct, two of the places of voting in the county of Madison, and at Greene court-house, the only place of voting in the county of Greene, where the polls were kept open two days longer. At the close of the polls on the first day, it is now agreed by both parties that the state of the vote was as follows, viz:

	Gilmer.	Goggin.
Bedford	377	733
Amherst	383	350
Nelson	219	320
Albemarle	589	649
Orange	178	162
Madison	372	47
Greene	123	54
	2,241	2,315
The votes given on the second and third days of voting were as follows, viz:		
Madison	84	8
Greene	36	18
	2,361	2,341

Mr. Gilmer's majority of the votes polled was, therefore, twenty. Neither party complains that any illegal votes were received, except the votes of two persons who voted for Mr. Goggin in two different counties, and whose votes, therefore, should only be counted once, leaving the majority of legal votes in favor of Mr. Gilmer to be twenty-two.

It is insisted by Mr. Goggin, in his memorial presented to the House and referred to the committee, that the votes polled on the two last days of voting, in the counties of Madison and Greene, should not be counted, on the ground that there was no sufficient cause for the adjournment; and if there was, that there was no request made to adjourn by any candidate or his agent, and therefore the adjournment was illegal.

The law of Virginia on the subject of adjournment is as follows, viz: "If the electors who appear be so numerous that they cannot all be polled before sunsetting, or if, by rain, or rise of water-courses, many of the electors may have been hindered from attending, the sheriff, under-sheriff, or other officer conducting the election at the court-house, and the superintendents of any separate poll, if such cause shall exist at any separate poll for the adjournment thereof, may, and shall, by the request of any one or more of the candidates, or their agents, adjourn the proceedings on the poll until the next day, and from

But, the main question in deciding the right of the representatives from New Hampshire, Georgia, Mississippi, and Missouri, results from the power of Congress *to alter* these election regulations of the State legislatures; and that question is: Does the law under consideration alter those regulations? "To alter" is a term of large meaning, and, in its application to this subject, will include any variation in substance whatever. It imports a greater power than any other term, except "to make" or its synonyme. Whatever the change—whether by adding to, striking from, or modifying—it is an alteration. The State legislatures have an implied power *to alter* their election regulations, but the Constitution gives to Congress the express power *to alter* those same State regulations; and as the express power of Congress is as extensive as the implied power of the State legislatures, any alterations which they *can* make in their regulations, whether of time, or place, or manner, Congress *may at any time make* with precisely the same effect; for it would be preposterous to assume that an alteration made by the State legislatures would be valid and operative, but being made by Congress, though in the same terms, is futile and void.

Some of the States have passed laws regulating their election of senators; others have not; and yet the constitutionality of the regulations of the latter States for holding their election of representatives has not been, and cannot be questioned. Such States as have no regulations by law for their senatorial elections may make *them* also: so Congress could pass a law regulating the election of senators generally; for that would be an alteration of the election regulations of some of the States, by adding to them. Congress could thus establish uniformity in the mode of electing senators, by enacting a law requiring both branches of the State legislatures to choose by their aggregate vote, and might confine its action to that, or any other particular regulation for the election of senators. That principle has generally prevailed in senatorial elections; and, in consequence of different parties having frequently the ascendency in the two houses of many of the State legislatures, and the difficulty and delay in choosing senators, it may become necessary for Congress to embody this principle into the election regulations, to secure the uninterrupted representation of the States in the Senate.

The State legislatures might alter their existing regulations relating to time, or place, or manner, confining their action to either one; and leaving intact, and in full force and effect, all relating to the other two; and a similar alteration, made by a law of Congress, would have the identical same operation. The State of Kentucky elects her representatives on the first Monday in every August before the first session of each Congress, as now fixed by law; and she has all needful regulations of place and manner. If her legislature, now in session, were to pass a law with the single provision that, hereafter, her elections should take place the first Monday in October next before the beginning of each term of Congress, it would surely make an alteration in her election regulations in point of time; and her subsequent elections, as of course, would be held accordingly. All the States have their complete regulations of time, place, and manner; but in many of the States the time is variant. If Congress were now to pass a law providing merely that the election of representatives in all the States should be held on the first Monday in every August before the beginning of each congressional term, it would alter the laws of every State whose time was in conflict; and elections would take place on the day named by Congress, but in all other respects in pursuance of the regulations made by the State legislatures.

In the case put, it is true every State would have all needful election regulations, with the residue of which, after changing time where it might clash, or any other feature whatever for which it might provide, the law of Congress would be incorporated, and make a harmonious and operative system. But the fact that the election regulations of the States had been so constructed that such

is also provided, by the act of 1831, that, if the sheriff or his deputy does not attend the election, he is subject to a fine; but the election may be held by any two of the superintendents, or, if they are absent, by two magistrates.

Mr. Goggin further insisted in his written argument that the officers conducting the election in the counties of Madison, Greene, and Amherst were not sworn; and that, for this defect, the votes in these counties should be wholly rejected. Admitting the correct principle to be that they should be presumed to be sworn unless the contrary is proved, he contended that he had produced at least *prima facie* evidence that they were not sworn sufficient to make it necessary for Mr. Gilmer to show that they were.

Without stopping to inquire whether the votes taken in a county or district ought to be rejected, and the voters be thus disfranchised, or the people put to the expense and trouble of a new election on account of the officers neglecting a part of their duty, even in so important a matter as that of being sworn, in a case where there is no allegation that the omission produced any practical evil, the committee are of opinion that the evidence produced does not amount to even *prima facie* proof that the superintendents conducting the elections in the counties above named were not sworn. The neglect of the sheriff or his deputy to take the oath prescribed by the law of 1831, which was applicable to his duties when he alone conducted the election at the court-house without the aid of superintendents, cannot be material now; since superintendents are appointed for all the polls, and those superintendents alone decide upon the legality of votes—the sheriff having no voice in the matter, and his presence not being essential to the validity of the election.

The evidence produced in regard to Madison county is a certificate of the clerk, which states that the sheriffs and superintendents were sworn. In regard to Greene, the deposition of Mr. Pritchett, the clerk of the county, was produced; who, being asked, in behalf of Mr. Goggin, if there was any record in his office of the oaths administered to the commissioners, sheriffs, &c., answered, "I can find none." Subsequently Mr. Pritchett certifies that he does find on file in his office certificates that the commissioners and the sheriffs were sworn; and he sends copies of the certificates. Oliver Finks, one of the superintendents, (or commissioners, as they are commonly called,) was examined for Mr. Goggin; and on his cross-examination being referred to the oath prescribed by law, and asked if that was the oath under which the commissioners for Greene county acted at the last election, he answered, "It is."

As to the county of Amherst, the only evidence produced to show that some of the officers were not sworn consists of two certificates from the clerk of that county. The first states that it appears, from an examination of the poll-books in his office, that the officers, at some of the places of voting in that county, (there being five in all,) which he names, were not sworn; and at some, which he names, they were sworn; and, in regard to one, where there was a majority for Mr. Goggin, he does not state how it appears. The second certificate gives what are stated to be true copies of all the certificates, affidavits, and memorandums, in writing, which were returned with the polls taken in the county on the 27th day of April, 1843, for a member of Congress. These two certificates are materially variant in their statements, and, in the opinion of the committee, are not entitled to be received as even *prima facie* evidence to disprove the swearing of the superintendents. The law requires the magistrates administering the oaths to return them to the clerk, to be by him filed and preserved. But the clerk's mere certificate is not competent evidence of facts in his own knowledge, or derived from an examination of the records in his office, although such certificate is competent to authenticate copies of documents regularly on file. He should have been examined on oath to prove facts, or to negative the existence of documents. The importance of this distinction is made obvious by the discrepancies in the different certificates produced in this case. If, how-

hough it omitted, whether from wilfulness or inadvertence, to constitute the
›per districts. An election by general ticket would be against her existing
r, and she would continue without representatives in Congress until her legis-
ure should again convene, and remedy its defective legislation. Suppose,
er passing the law, the house of representatives of Mississippi should pass a
v dividing the State into single congressional districts, in which the senate
ould not concur, and it was to fail by disagreement of the two houses; that
ıte of things would not abstract anything from the effect of the first law, and
e abrogation of the general ticket would still be complete. The law of Con-
ess has just the same effect in all the States where the general ticket pre-
iled, as the law of Mississippi would have in that State. But let us present
e argument, that this second section, providing for districts, not being in a
m to be executed, is therefore a nullity, and of no effect, in another point of
ew. The 4th section of the Constitution—"The times, places, and manner of
lding elections for senators and representatives shall be prescribed in each
ate by the legislature thereof; but the Congress may at any time, by law,
ıke or alter such regulations, except as to the places of choosing senators"—
nnot be executed or put into practical operation without extensive legislation,
ate or national; and nobody will contend that it is a nullity. Suppose the
nvention had extended this provision of the Constitution by adding these
›rds: "but, for the election of representatives, each State entitled to more
an one representative shall be divided into districts, and each district shall
ect but one representative;" would such a clause be a nullity, and not be obli-
tory on the State legislature? As a part of the Constitution, this second
ction would have to be conformed to by the State legislatures, all will admit;
d yet there it could of itself be no more executed than as a provision in a law of
›ngress. In both positions, it would require legislation either on the part of
e States, or of Congress, to give it practical effect. Because such a regula-
›n standing alone could not be executed, does not, then, prove it to be a nullity.
Why would the State legislatures be bound by it, and observe it as a clause in
e Constitution? Because it would be a part of the supreme law of the land,
d have a paramount obligation. But it is a law of Congress, admitted by
erybody to be made in *pursuance* of the Constitution, which declares that such
ws also shall be the supreme law of the land; and its obligation is paramount
all State authority and all State laws, and their legislatures are therefore
ınd to conform to it.

The 1st section of the last apportionment act provides, "That from and after
e 3d day of March, 1843, the House of representatives *shall* be composed of
embers elected agreeably to a ratio of one representative for every seventy
ousand six hundred and eighty persons in every State, and one additional
presentative for each having a fraction greater than one moiety of the said
tio, computed according to the rule prescribed by the Constitution of the
nited States;" and the same section then proceeds to declare, by names and
ımbers, how many representatives each State shall elect. No person has
ıpugned the constitutionality, validity, or obligation of this part of the law;
ıd yet, of itself, it is equally incapable of being executed as the second section.
›th were framed with a view to, and both require, auxiliary State legislation
give them effect; and the one is just as mandatory upon the State legisla-
res as the other. Both are equally restrictive upon the discretion of those
gislatures; and they are under the same constitutional obligation to conform
eir legislation to the terms and provisions of each. Similar laws of Congress
relation to the House of representatives, and also to electors of the President,
ıve been respected by the States for more than fifty years, and were never
ımurred to as being either a nullity, or in the nature of a mandamus upon
eir legislatures. All the State legislatures have co-operated in making effect-
e the first section of the law, by exactly squaring their legislation with it,

It is insisted by Mr. Botts, in his memorial, that he received a majority of the votes of the legally qualified voters of the district, given at the polls; and for the purpose of sustaining and disproving this allegation, the testimony of many witnesses, taken by the respective parties, and numerous wills, deeds, and other documents, produced by them, have been read and considered by the committee in the course of a most laborious and protracted examination of the case. There being no law prescribing the mode of contesting elections for members of this house, the parties prepared their cases, in most respects, in conformity with the provisions of the law of Virginia regulating the mode of contesting elections for the State legislature. Those laws require the person intending to contest the election of a senator or delegate, within twenty-five days after the election in the case of a senator, within fifteen days in the case of a delegate for a county or city, and within twenty days in the case of a delegate for an election district, to give the person whose seat is contested notice thereof in writing, and to deliver to him a list of those persons to whose votes he hath objection, stating the objection, and where he hath any other objection to the legality of the election, or eligibility of the person whose election is contested, distinguishing his particular objections. The opposite party may, within twenty days after receiving such notice, deliver the like lists on his part. To the notice of votes that are to be contested the party is required to append an oath, that he has reason to believe the persons whose names are mentioned are not legally qualified to vote. Notices being thus served, the parties are authorized to take depositions before a justice of the peace, upon reasonable notice of the time and place, beginning within one month after the delivery of the notice and finishing the taking at least thirty days preceding the commencement of the ensuing session of the general assembly.

Mr. Botts, on his part, gave notices to Mr. Jones of his objections against two hundred and eighty-four voters, who gave their votes for Mr. Jones, and whose names are contained in the copies of the lists of votes kept at the several places of voting, submitted to the committee, and against three persons whose names do not appear on those lists. The notice of the objections to twenty of the said voters was delivered fifty-five days after the election; but Mr. Jones not making this an objection, although he did not waive his right to do so, the notice was considered as if delivered in due time.

Mr. Jones, on his part, gave notice in due time of his objections against four hundred and forty voters, who gave their votes for Mr. Botts, and whose names (except a few, which have been counted as good votes, because not properly objected to) are contained in the copies of the poll-books submitted to the committee.

Upon commencing the examination of the testimony and documents produced by the parties, it appeared that, according to the practice in contesting votes for members of the legislature of Virginia, each party considered himself bound to establish the right of the voter challenged, and in many cases where the vote was known to be unquestionably illegal; he therefore took no evidence respecting it, nor did the other party undertake to show it to be bad. The committee are of opinion that the true principle is, that every voter admitted by the regular officers authorized to decide the question at the polls ought to be considered legally qualified, unless the contrary be shown. But inasmuch as the parties had proceeded under the laws and practice of Virginia, and all their evidence was taken professedly under the authority of those laws, and not by virtue of any authority given by the House of Representatives or by the committee; and inasmuch as, from the manner of taking the testimony, justice could not have been done to the parties, by proceeding upon what the committee suppose is the true principle, it was determined to decide the case according to the laws and practice in contesting seats in the legislature of Virginia, voluntarily adopted by the parties.

The right of more than six hundred voters was decided by the committee, upon the evidence produced in each case; and those that were proved to have the qualifications prescribed by the constitution and laws of Virginia for electors of delegates to the general assembly of that State were adjudged to be good voters; and all those cases in which the testimony proved that the voter was not qualified, or in which the testimony failed to establish the voter's right, were taken to be illegal, and were rejected. Those voters whose votes were objected to, respecting which no testimony was produced, were also considered as thereby admitted to be illegal, and were also rejected. The committee have not deemed it expedient to swell this report with the names of the voters decided to be good, or disallowed as bad; but a list of them has been made and is reported with the testimony, and may be examined if it be found necessary. The result may be stated as follows:

Number of voters for Mr. Jones objected to by Mr. Botts; number decided to be good, and number rejected.

	Number objected.	Good.	Bad
Chesterfield	101		
Not on poll	2		
	99	69	30
Powhatan	10	2	8
Goochland	12	10	2
Louisa	29	16	13
Hanover	59		
Not on poll	1		
	58	34	24
Henrico	27	16	11
Richmond	49	20	29
Total rejected, not being shown to be good			117

Number of voters for Mr. Botts objected to by Mr. Jones; number decided to be good, and number rejected.

	Number objected.	Good.	Bad.
Chesterfield	48	18	30
Powhatan	20	3	17
Goochland	23	10	13
Louisa	45	25	20
Hanover	64	33	31
Henrico	63	25	38
Richmond	177	88	89
Total rejected, not being shown to be good			238

Two voters were allowed to Mr. Botts in this count who were rejected by the superintendents, but shown to be good voters; and several were also counted as good, because not rightly named in Mr. Jones's notice.

RECAPITULATION.

Number of voters for Mr. Botts rejected	238
Number of voters for Mr. Jones rejected	117
Mr. Botts's excess of bad votes	121
Add Mr. Jones's original majority	34
Majority of legal votes for Mr. Jones	155

Mr. Botts asks to have the majority given for Mr. Jones in the county of Chesterfield (amounting to three hundred and fifteen votes) wholly rejected, upon the ground that the election was not legally held, and is therefore null and void. The objection made to the election in this county is, that only one poll-book was kept by one writer, or poll-keeper, of the votes for a member of Congress—it being insisted by Mr. Botts that the law of Virginia, regulating the elections of members of Congress, requires more than one. That law is as follows:

The person authorized by law to hold elections for members of the general assembly in each county, city, and borough shall conduct the said election, at which no determination shall be had by view; but each person qualified to vote shall fairly and publicly poll, and the name of the voter shall be duly entered under the name of the person voted for, in proper poll-books, to be provided by the officer conducting the election; for which purpose he shall appoint so many writers as he shall think fit, who shall respectively take an oath, to be administered by him, or make solemn affirmation, that they will take the poll fairly and impartially; he shall deliver a poll-book to each writer, who shall enter in distinct columns, under the name of the person voted for, the name of each elector voting for such person. Like proclamation and proceedings shall be had for conducting, continuing, and closing the poll in each county of a district, as is prescribed by law in the election of members of the general assembly.

Subsequent laws provide that the election for senators, delegates, and members of Congress shall be holden at the same time and place in each county or city, and by the same officers; and a direction similar to that above copied is given for the appointment of writers or poll-keepers.

The person conducting the election at the time of the passing of the above act in 1813, in the counties, was the sheriff. By the provisions of acts since passed, superintendents or commissioners are required to be appointed; any two or more of whom hold the elections, appoint the writers, and decide upon the qualifications of the voters—the sheriff having no voice in the matter, and his presence not being necessary. From the testimony submitted to us, it appears that three writers were appointed and sworn—one of whom kept the poll-book of the votes for member of Congress, one kept the book of the votes for senator, and another the book of the votes for delegate to the Virginia legislature, who were all voted for at the same election. The superintendents did, in point of fact, appoint and qualify more than one writer, who assisted in conducting this election, and whose respective duties were distributed to them, as the circumstances of the case required. In the opinion of the committee, however, the laws above referred to do not require the officers to appoint more than one writer, or provide more than one poll-book, unless they think fit. The authority given to appoint so many as they think fit, is an authority to appoint only one, if, in their judgment, one is sufficient. Should the true construction of the laws be considered to require the superintendents to appoint more than one writer to keep the poll of each officer voted for, still the committee do not think that the omission to do so is such an irregularity as to render the election null and void, and thus deprive the people of their votes, or put them to the trouble and expense of a new election. No fraud or unfairness is complained of, nor is it shown that any mistakes were made by the writer

ployed. The memorialist was himself present during a considerable part of day, saw how the election was conducted, and made no objection to it. No ision of this House, so far as the committee are informed, has ever sanctioned h a result. The case of Easton *vs.* Scott (Contested Election Cases, page ;) referred to by Mr. Botts in his memorial is altogether different from this. at was the case of an election held in 1816, in the then Territory of Missouri, ere the law expressly required that there should be three judges and two :ks, and that the electors should vote by ballot. It was stated to be proved t in one township the judges put on the list the names of persons who did vote, and were not in the township; and that one person refused to vote, was compelled to do so by the judges, who sent a paper to bring him before m. The committee decided to reject the votes in that township, as they :e, "for a variety of causes, among which are the following: 1st. The elec- ı was held *viva voce*. 2d. But two persons acted as judges, and neither of m was sworn. 3d. But one person acted as clerk, and he was not sworn. . The votes were rejected by the justices whom the clerk took to his assist- e in making out the abstracts to be forwarded to the governor; they were t to the governor in an irregular manner; and the paper called a 'return' ·eared, upon its face, defective in many important particulars." These ses, combined with the other facts of the case, were amply sufficient to justify t decision; and whenever they shall exist in another case, will render it per to conform to it. In the case before us, the committee have decided, and mit to the House, that there is no sufficient reason for setting aside the elec- ı held in the county of Chesterfield; and that the votes given there, after :cting those specially objected to and not proven to be legal, ought to be nted.

)bjection is made by Mr. Botts to the votes given at Poor's precinct, in the nty of Goochland, where Mr. Jones had a majority of thirty-six votes. If se votes should be rejected, it will be perceived that the result will not be cted. But the committee are not of opinion that they ought to be rejected. The law of Virginia respecting contested elections, before recited, and under provisions of which the parties acted and prepared their case, requires a ılar notice to be served of any objections to the legality of the election, as l as of objections against particular voters. Notice was given by Mr. Botts)bjections to several voters who voted at this precinct, and testimony has n taken touching their legality. But it is not shown that any notice whatever ın objection to the legality of this election was at any time served on Mr. ıes, or on any attorney authorized by him to receive notices of objections. Jones admitted before the committee, that a few days before he left home attend the meeting of Congress he received information from his attorney,) was authorized to give and receive notices of the time and place of taking ·ositions to be used in support of votes objected to in Goochland county, that had been notified that such an objection would be taken; and it was further :ed by Mr. Jones, that he answered his attorney by informing him that no ice respecting such alleged illegality had been served on him, and that he d not give himself any trouble about it. The attorney, however, had his ı deposition taken on this subject on the 29th day of November, 1843. On 15th of January last, Mr. Botts had depositions taken, and the witnesses ·e cross-examined by Mr. Jones's counsel, after entering his protest against legality of the proceeding. The committee think that depositions thus en in support of an alleged illegality, of which no notice was given, and ·r notice had been given of objections to particular votes, pursuant to the of Virginia, ought not to be received. These depositions were not taken pursuance of any authority given by this House, or by the committee; and,)ffered as taken in pursuance of the law of Virginia, it should appear that t law was complied with.

If these depositions are received, and this objection considered, it becomes necessary to inquire whether the facts proved are such as to require the election at that precinct to be considered null and void. The sheriff, it appears, did not take the oath prescribed by the act of 1831 respecting elections, although he was sworn to fulfil the duties of his office, when appointed. By that act it was made the duty of the sheriff to hold the elections, in certain cases, himself, and to decide upon the legality of votes; and an oath was prescribed applicable to his then duties. Now, all the elections are required to be conducted by superintendents, who alone decide upon the votes, and who are authorized to proceed without the presence of the sheriff; so that the oath prescribed has become inapplicable to the duties to be performed by the sheriff, if he thinks proper to attend, as it is still his duty to do. Two superintendents, it appears, did conduct the election all the time at this precinct; but it would seem that one of those who acted during a part of a day was not sworn. This was undoubtedly irregular and illegal; but the committee are not prepared, on that account, to set aside the election as wholly null and void, in a case where it appears to have been fairly conducted; where the name of every voter and his vote is recorded, so that if either party objects to him, the other is required to prove him legally qualified to vote; and where such objections have been actually made, and the votes rejected unless duly proven to be good. None of the cases cited by Mr. Botts, in his memorial, on this point, are like the case now before us. The committee recommend the following resolution:

Resolved, That John W. Jones is entitled to his seat in this House, as a representative from the sixth congressional district of the State of Virginia.

When the case came into the House a very brief debate ensued.

Mr. SCHENCK moved that the further consideration of the reports of the majority and of the minority of the Committee of Elections in this case be postponed until Thursday next.

Mr. S. proceeded to remark that, in order to get a full understanding of the grounds upon which the minority of the committee had come to the conclusion to which they had arrived, it seemed to him it was absolutely necessary that gentlemen should have an opportunity of examining the evidence. The minority, it was true, had concurred with the decision of the majority in its final result; but there remained a question regarding the qualification of votes, the decision of which would affect the legality of the election in many of the States. He had concurred in excluding the class of votes excluded by the majority, because the admission of such votes (under the qualifications prescribed by the States) would be rendering nugatory the power granted to the Congress of the United States—the States being permitted to admit to citizenship those who were not recognized as citizens in every respect, and particularly under the laws of the United States. It was true, it would cut off thousands of voters in Michigan and other States; and he would say to his New England friends that it would cut off the votes of all colored persons. If the kind of votes to which he had referred were allowed, Mr. Botts would have a majority of three or four votes, and consequently be entitled to the seat; but being excluded, Mr. Jones had a majority.

The vote was taken June 6.

Mr. ELMER said, as some explanation of the action of the committee might perhaps be expected from him, he would trouble the House with a very few brief remarks. He trusted the House would be as unanimous in its decision of this question as the committee had been. He argued that the committee could not have come to any other conclusion than they did, even if they had followed the requirements of the contesting candidate [Mr. Botts] himself, in regard to the allowance or rejection of votes. And he said, further, that it was a case which ought never to have come before the House, for there was no good ground on which the seat of Mr. Jones could be contested. He went into an explanation of the case at some length, and also of the action of the committee thereon.

Mr. NEWTON said both the majority and the minority of the committee had arrived at the same result respecting the right of the sitting member; but he went on to show that the contest on the part of Mr. Botts was not vexatious, nor frivolous.

Mr. HAMLIN also addressed the House, and complained of the course pursued by the minority of the Election Committee. He concluded by moving the previous question; which was seconded by the House, and the main question ordered to be put.

Mr. HAMMET called for the yeas and nays on the adoption of the resolution from the majority of the Committee of Elections, declaratory of the right of Mr. Jones to his seat, and they were ordered; and being taken, resulted thus: yeas 150, nays *none*.

TWENTY-NINTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. HAMLIN, Maine.
A. A. CHAPMAN, Virginia.
HARPER, Ohio.
CHASE, Tennessee.
DOBBIN, North Carolina.
Mr. ELLSWORTH, New York.
McGAUGHEY, Indiana.
CULVER, New Jersey.
CHIPMAN, Michigan.

BROCKENBROUGH *vs.* CABELL, OF FLORIDA.

Where votes given to a representative in Congress are required by State law to be returned within a specified time—held that the law is simply directory, and that votes returned after the time specified may be counted.

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 7, 1846.

Mr. HAMLIN, from the Committee of Elections, made the following report:

The memorial of Mr. Brockenbrough claims that he was entitled to the commission of the governor at the time it was given to Mr. Cabell, upon the ground that of the votes then legally returned a majority was for him; and further, that of all the votes legally given at the election, a majority was also in his favor. Said memorial is as follows, addressed to the House of Representatives:

The memorial and petition of William H. Brockenbrough, representative elect from the State of Florida in the 29th Congress, respectfully shows—

That he claims the right to a seat in the House of Representatives, and to represent the people of Florida in the 29th Congress, and exhibits herewith the certificate of the secretary of state of Florida, under the great seal of the State, as conclusive evidence that at the time required by law for counting the votes returned to the office of the secretary of state, the majority of votes, by the lawful returns, was in favor of your memorialist.

Your memorialist further protests against and contests the right of Edward C. Cabell to a seat in the House of Representatives, or to represent the people of Florida in the 29th Congress of the United States—

First. Because he denies and contests the *election* of the said Edward C. Cabell upon the following grounds, to wit:

Because, at the election held in the State of Florida according to law, on the 6th day of October, A. D. 1845, for representative of the people of Florida in the 29th Congress, the greatest number of votes of the legally qualified voters of the State of Florida was cast in favor of your memorialist, and not in favor of the said Edward C. Cabell.

Secondly. This memorialist protests against and contests the right of the said Edward C. Cabell to a seat in the House of Representatives, or to represent the people of Florida in the House of Representatives of the 29th Congress—

Because he contests and denies the force, effect, and validity of the *return* of the said Edward C. Cabell, and claims that the same shall be wholly set aside and held for naught, as illegal, irregular, informal, and invalid, on the following grounds, to wit:

Because, at the expiration of thirty days after the election for representative in the 29th Congress, at which time the law required the returns in his office to be counted by the secretary of state, the greatest number of votes, by the lawful returns then in the office of the secretary of state, was in favor of this memorialist, and not in favor of the said Edward C. Cabell, as is shown by the certificate of said secretary, hereinbefore referred to. And the certificate which was given in favor of said Cabell, by the said secretary, upon which the commission of the governor was granted, was unlawful, erroneous, and wholly null and void, and did not represent to the governor the true state of facts; because the said secretary counted as in favor of the said Edward C. Cabell certain supposed votes of which there was no legal return in his office. Of all which said Cabell has had notice, a copy of which is herewith presented; and all of which is herewith presented and respectfully submitted by your memorialist.

W. H. BROCKENBROUGH,
Representative elect of the people of Florida in the 29th Congress of the United States.

There is no law of the United States regulating the mode and manner of proceedings in cases of contested elections. The law of the State where the parties reside is therefore resorted to, so far as it may be applicable, as the rule by which your committee is directed. By the law of Florida, it is provided that any candidate who shall contest the election of any person to the senate or house of representatives of that State shall give notice thereof, in writing, to the person whose election he contests, within ten days after the canvass of county clerks, and within thirty days after the canvass of the secretary of state. It was made the duty of county clerks to canvass the votes given for officers in their several counties, and the secretary of state to canvass the votes for officers who were elected by the whole State; and it was competent for Mr. Brockenbrough to give the notice required by law within thirty days after the canvass of the secretary of state.

On the 19th day of November, A. D. 1845, Mr. Cabell was notified by Mr. Brockenbrough, agreeably to the requirements of law, the canvassing of said votes having taken place on the 6th of said November by the secretary of state, and was by him certified to the governor. A copy of said notice is annexed, marked A. The notice was objected to as insufficient by Mr. Cabell, but your committee were of a different opinion.

The law of Florida, approved July 26, 1845, "prescribed the time, place, and manner of electing representatives to Congress," &c. Chapter 16, section 2, provides "that the returns of said election for representative in Congress shall be made to the secretary of state of this State, who shall count the same at the expiration of thirty days after the election, and certify the result to the governor of the State, who shall commission the person receiving the greatest number of votes."

At the expiration of said time the secretary of state did so count said votes, and certify the same to the governor of Florida, accompanied by a tabular statement of the return of votes then made to him. The governor, upon the certificate and accompanying tabular statement of votes made to him by the secretary of state, on the 6th day of November issued his commission to Edward C. Cabell. A copy of that commission is annexed, marked B.

Mr. Brockenbrough presented to the committee a copy, duly attested, and under the seal of the State, of the tabular statement of the votes, certified by the secretary of state to the governor, in the manner before named. That paper was admitted as evidence by the committee, and without objection from any one. A copy of that paper is annexed, marked No. 1.

He also offered certified copies of returns from the counties of Santa Rosa, Washington, Hillsboro', and Columbia, made to the office of the secretary of state, by judges of probate, after the expiration of thirty days, and after the secretary of state had made his certificate to the governor. Copies of these papers are annexed, and marked Nos. 2 and 6. They were admitted as evidence by the committee.

He further offered to the committee certified copies of the returns made by inspectors of elections to the secretary of state, after thirty days from the precincts of Key West and Tortugas, in the county of Monroe, and Brandy Branch, in the county of Nassau. These papers were received in evidence by the committee, and copies are annexed, marked Nos. 3, 4, and 5. But the committee refused to count or allow the votes returned in said papers. Mr. Brockenbrough also presented a paper marked 2; but it was not considered as evidence by your committee.

To understand the evidence contained in the foregoing papers, it becomes necessary to examine the laws of Florida for the purpose of ascertaining who are the officers created and directed to make the returns of votes given at an election for representative in Congress. Tabular statement No. 1 presents the evidence of returns made by three classes of persons, to wit: judges of probate, county

clerk, and by other persons supposed to be inspectors of elections; and the evidence offered by Mr. Brockenbrough consists of two kinds of returns—one made by judges of probate, and the other by inspectors.

What officers, then, by law were created and directed to make returns of said election? and what votes returned by the various officers should be counted and allowed?

The following extract from the laws of Florida, approved March 15, A. D. 1843, define the manner of holding elections, and who shall make return of votes; which law, in the opinion of your committee, together with another law, (being chapter 16,) already referred to, constitutes the law governing elections and return of votes. The constitution provides that all laws and parts of laws now in force, or which may be hereafter passed, while Florida was a Territory, not repugnant to the constitution, shall continue in force until, by operation of their provisions or limitations, the same shall cease to be in force, or until the general assembly of the State of Florida shall alter or repeal the same.

Sections of the law of Florida, passed March 15, 1843, providing for the election of officers, are applicable to this case.

* * * * * *

The territorial law of 1843 is clear and explicit in its terms. It empowers county clerks to order elections for *county officers*, to appoint inspectors to hold elections, and make returns of said elections to the county clerk; and for the clerk to certify the votes so returned to him to the secretary. It contains, in fact, all the necessary provisions for ordering, holding, and perfecting elections of county officers.

The law of July, 1845, providing for the election of representative in Congress, directs that representatives in Congress shall be elected in the same way as county officers; and the 6th section of the act transfers to judges of probate the same powers and duties, in relation to the ordering, holding, and perfecting elections, that were conferred upon county clerks.

There can, then, be no doubt that judges of probate were the officers legally authorized and directed to order this election, appoint inspectors, and make returns of the same, unless the provisions of the foregoing law are changed or modified by some other act.

There is no law altering or changing the same, unless it be an act passed by the Territory of Florida, March 11, 1845, "to facilitate the organization of Florida."

There was a territorial law, approved March 11, A. D. 1845, entitled "An act to facilitate the organization of Florida" That law, in the opinion of your committee, does not change the laws before referred to. It was a special law, designed for a special purpose; that purpose having been effected, the law ceases to have any further force or effect. It provided only for the election of certain State officers, on the admission of Florida into the Union, and also for a representative in Congress. That representative was so elected, and resigned his seat. The legislature elected under the operations of that law passed the act of July 26, A. D. 1845, chap. 16, under which this election was held. It will be borne in mind that said law did *not* provide for the election of any county officers. It repealed all laws inconsistent with it; but that repealing clause could not apply to a law regulating county officers, for it contained no provision in relation to, or providing for, the election of county officers. It was a law to facilitate the organization of Florida, and directed county clerks to appoint inspectors of election to elect certain officers therein named. The law of July 26, 1845, subsequently passed by the legislature of the State of Florida, and under which this election was held, provides that representatives in Congress shall be elected in the same way as county officers—and could not, therefore, refer to the said law of March 11, but to the law of 1843, providing for the election of county officers.

The territorial act of 1845 (March 11) does not conflict with the law of 1843,

except to adapt the latter to the provisions of the constitution; and the law of 1843 is only repealed so far as it so conflicts. So far from repealing the law of 1843, it specially invokes its aid in many passages, and in general terms in the 8th section. The law of 1845 requires additional duties of the returning officers, but it repeals none of the former duties. It is an act to organize the government of Florida, and cannot be used after it is organized.

It requires the clerks (section 1) to perform their duties, not by general law, but by a proclamation of the governor, setting forth certain facts and laws. It requires, in that particular case, that the names of the persons appointed inspectors shall be transmitted by county clerks to the secretary of the Territory, and also to the committee of the constitution convention at Tallahassee. The same act also requires inspectors in that case to send their returns to said constitutional committee, to the secretary of the Territory, and to the county clerks. The secretary is then to report to the constitutional committee; and the certificate of said committee, (section 15,) and not of the secretary, is to be the evidence of election. This constitutes almost the whole difference between the acts of 1845 and 1843. If the act of 1843 is repealed, and that of 1845 substituted, the constitutional committee is a permanent body, and their certificate is requisite, for the secretary is bound to report to them, and the committee gives the certificate.

If the law of 1845 is the law, there is no provision for the election of county officers whatever. That law was to organize the State, by electing governor, legislature, and representatives in Congress; and county officers were to be elected after the State was organized; and they have been elected, and yet there has been no new provision. They were elected under the law of 1843, or without law.

The State act (July 26, 1845) for the election of representatives in Congress, and prescribing *time*, *place*, and *manner*, only prescribes them by reference to the county officers, of clerks, &c.; and as there is no provision for them in the territorial act of 1845, or elsewhere, except the act of 1843, it follows that the latter is referred to and adopted by the State act. The same act fulfils the requisition of the State constitution, as to returns being made to the secretary of state, in manner to be prescribed by law, (constitution, article 1, section 16,) by giving the judges of probate the same powers and duties as were given to the county clerks, and authorizing them in the same way to order county or general elections.

The clerks had no power to order county or general elections by the territorial act of 1845. They were required by proclamation to order a single State election for special purposes, and not county elections.

But, by the act of 1843, they had powers to order county and general elections. Thus the act of 1845 does not repeal or intend to repeal the act of 1843, but to adopt it for that special occasion, and to leave it as the general election law of the State; and the general assembly, by their act, could not have referred to the act of 1845, but to the act of 1843, because their act is consistent with the latter and not the former. As additional evidence that the territorial legislature of 1845 did not intend to repeal the law of 1843, it amended the very law of 1843, and the amendment immediately follows the law, which, it is contended, was the repealing law.

Arriving, therefore, at the conclusion that the law of 1843, and the law of July, 1845, are the laws which govern this election, your committee can come to no other conclusion than that the judges of probate are the officers directed to appoint inspectors of elections; that the inspectors should return the votes of their several precincts to said judges, and the judges to the secretary of state. If, however, no judges of probate had been appointed, commissioned, and qualified at the time of this election, it would have been the duty of the county clerk to have performed the same services, as the constitution provides "that

all officers, civil and military, now holding their offices and appointments in the Territory under the authority of the United States, or under the authority of the Territory, shall continue to hold and exercise their respective offices and appointments until superseded under the constitution."

By the law of 1843, county clerks were the officers to order elections, appoint inspectors, receive their returns, and certify them to the secretary of the Territory. The law of July, 1845, imposes the same duties upon judges of probate; but county clerks, under the foregoing provision of the constitution, would continue to discharge their duties until judges of probate were appointed, commissioned, and qualified.

Under the foregoing view of this case, and examination of the evidence, the following facts appear: the whole number of votes certified by the secretary of state to the governor, at the end of thirty days after the election, as per tabular statement No. 1, was 5,013—

For E. C. Cabell	2,523
For W. H. Brockenbrough	2,472
Majority for Mr. Cabell	51

The returns made in said tabular statement by judges of probate, within thirty days, to the secretary of state, were from the counties of Jackson, Franklin, Gadsden, Leon, Wakula, Jefferson, Madison, Hamilton, Alachua, Marion, Benton, Orange, Duval, and St. John's—

	For Mr. Brockenbrough.	For Mr. Cabell.
Giving	1,827	1,816
Add returns made by the county clerk of Nassau	79	26
	1,956	1,842
Majority for Mr. Brockenbrough, 114.		
Add to the foregoing returns embraced in papers marked 2 and 6, being returns made by judges of probate after the expiration of 30 days, to wit:		
Santa Rosa county	35	137
Washington county	85	13
Hillsboro' county	61	33
Columbia county	229	172
	2,366	2,197
Majority for Mr. Brockenbrough		169

It will be observed that the counties of Santa Rosa, Washington, and Columbia were not returned to the secretary of state at the expiration of thirty days by judges of probate, but were partially returned by other persons, who were undoubtedly inspectors. But said returns were made by judges of probate after the expiration of thirty days. There are, then, remaining in the tabular statement No. 1 the following counties not returned by judges of probate or county clerks, supposed to be by inspectors:

RECAPITULATION.

Number of voters for Mr. Botts rejected	238
Number of voters for Mr. Jones rejected	117
Mr. Botts's excess of bad votes	121
Add Mr. Jones's original majority	34
Majority of legal votes for Mr. Jones	155

Mr. Botts asks to have the majority given for Mr. Jones in the county of Chesterfield (amounting to three hundred and fifteen votes) wholly rejected upon the ground that the election was not legally held, and is therefore null and void. The objection made to the election in this county is, that only one poll-book was kept by one writer, or poll-keeper, of the votes for a member of Congress—it being insisted by Mr. Botts that the law of Virginia, regulating the elections of members of Congress, requires more than one. That law is as follows:

The person authorized by law to hold elections for members of the general assembly in each county, city, and borough shall conduct the said election, at which no determination shall be had by view; but each person qualified to vote shall fairly and publicly poll, and the name of the voter shall be duly entered under the name of the person voted for, in proper poll-books, to be provided by the officer conducting the election; for which purpose he shall appoint so many writers as he shall think fit, who shall respectively take an oath, to be administered by him, or make solemn affirmation, that they will take the poll fairly and impartially; he shall deliver a poll-book to each writer, who shall enter in distinct columns, under the name of the person voted for, the name of each elector voting for such person. Like proclamation and proceedings shall be had for conducting, continuing, and closing the poll in each county of a district, as is prescribed by law in the election of members of the general assembly.

Subsequent laws provide that the election for senators, delegates, and members of Congress shall be holden at the same time and place in each county or city, and by the same officers; and a direction similar to that above copied is given for the appointment of writers or poll-keepers.

The person conducting the election at the time of the passing of the above act in 1813, in the counties, was the sheriff. By the provisions of acts since passed, superintendents or commissioners are required to be appointed; any two or more of whom hold the elections, appoint the writers, and decide upon the qualifications of the voters—the sheriff having no voice in the matter, and his presence not being necessary. From the testimony submitted to us, it appears that three writers were appointed and sworn—one of whom kept the poll-book of the votes for member of Congress, one kept the book of the votes for senator, and another the book of the votes for delegate to the Virginia legislature, who were all voted for at the same election. The superintendents did, in point of fact, appoint and qualify more than one writer, who assisted in conducting this election, and whose respective duties were distributed to them, as the circumstances of the case required. In the opinion of the committee, however, the laws above referred to do not require the officers to appoint more than one writer, or provide more than one poll-book, unless they think fit. The authority given to appoint so many as they think fit, is an authority to appoint only one, if, in their judgment, one is sufficient. Should the true construction of the laws be considered to require the superintendents to appoint more than one writer to keep the poll of each officer voted for, still the committee do not think that the omission to do so is such an irregularity as to render the election null and void, and thus deprive the people of their votes, or put them to the trouble and expense of a new election. No fraud or unfairness is complained of, nor is it shown that any mistakes were made by the writer

Your committee, therefore, submit the following resolutions:

Resolved, That Edward C. Cabell, returned to this house as a member thereof, from the State of Florida, is not entitled to his seat.

Resolved, That William H. Brockenbrough is entitled to a seat in this house as a representative from the State of Florida.

In the debate in the House, Mr. HAMLIN, of Maine, said:

The law of 1845, passed after Florida became a State, changed the duty of the county clerks. It provided that judges of probate should perform the same duties in the State of Florida that were originally performed in the Territory by the county clerks. If the matter had been left there, and there had been no other law, the case would be perfectly clear. No question could be raised, because the law of the State imposed upon the judges of probate, when appointed, the same duties that had been performed by the county clerks. They were to order elections. The law declared that a representative in Congress should be elected in the same way and manner as the county officers. If, therefore, these were the only two laws, there could be no doubt that the judges of probate in 1845 were the same officers who, under the law of 1843, were to discharge the duties of county clerk.

But in the month of May, 1845, the legislature of Florida (before she became a State) passed another law—a law "to facilitate the admission of Florida into the Union." The committee were of opinion that it was a law designed expressly for that purpose, and none other; and that, after that event had taken place, it ceased to have any legal vitality. Indeed, it must be so, because the law passed in July, 1845, did not refer to the territorial law of May, 1845, for there was no provision in that territorial law to regulate the mode and manner of electing county officers. The law itself, in every form, by its caption and its preamble, was a special law, designed for the sole purpose of facilitating the admission of the Territory as a State into the Union, and of electing a representative in Congress at that time.

Under that law a representative was elected. He resigned. The legislature met and adopted the law of July, prescribing the mode and manner of electing members of Congress; that was to say, in the same way as county officers; and the judges of probate were to exercise the same powers and duties that county clerks originally had exercised. Hence the only conclusion to be drawn was, that judges of probate were now to appoint inspectors and to receive returns, and to make these returns to the secretary of state. The secretary of state, in turn, was to certify the aggregate of votes received at his office, within thirty days, to the governor; and on that certificate the governor was to issue his commission.

Such was the opinion of the committee; and it was believed that, on a careful examination of the matter, gentlemen on all sides could come to no other conclusion. Once having arrived at the conclusion that the judges of probate were the legal returning officers, that they were the officers pointed out by law, through whom the votes shall reach the office of the secretary of state, we might settle down upon a strict legal principle, that the number of votes received at his office within thirty days would be the only strict legal mode of ascertaining who was entitled, at the expiration of that thirty days, to the commission of the governor. And if this rule was taken as the basis of action, if we stopped there, then Mr. Brockenbrough was elected by a majority of one hundred and fourteen votes; that was to say, votes returned within thirty days by judges of probate and one county clerk would give him that majority. County clerks, gentlemen would bear in mind, stood precisely in the same condition as judges of probate, because they originally performed that duty; and the constitution provided that they should continue to discharge their duties till judges of probate should be appointed.

But, sir, as an individual member of that committee, I could not consent to fetter down and infringe upon the rights of the people of Florida by the provisions of any law simply directory. It must necessarily result in this, that the officers appointed to do certain duties, in making returns, are, in fact, made electing officers; it is no longer an election of the people of the State, but an election of the returning officers. What is the true state of the votes given at the polls by the legal voters of the State, is the true question before the House, on the decision of which, I trust, they will make the decision of this question depend. I care not through what channel the votes thus legally cast reach the secretary of state, or reach us here; that question would not have the weight of a single feather with me; it has not the power to be galvanized into life by all the eloquence and all the ingenuity which gentlemen can bring to bear upon it; for the moment you depart from this rule, for which I contend, you make the result of the election depend, not on the elector but upon the corrupt officer, upon accidental loss, and upon every other incidental circumstance which may come in to defeat the will of the people; and I have learned the lesson, which I shall not soon forget, that it is the true expression of the legal voters of this country which is to be heard.

* * * The first paper was a statement, certified by the secretary of state as being an exact copy of that statement which he had sent to the governor within the thirty days required by law after the election, and on which statement the governor had issued his commission to the sitting member. This paper presented returns from three classes of officers. It was true the law of Florida provides by what class of officers the returns shall be made. A portion of these returns were made by judges of probate: the majority of the committee

If these depositions are received, and this objection considered, it becomes necessary to inquire whether the facts proved are such as to require the election at that precinct to be considered null and void. The sheriff, it appears, did not take the oath prescribed by the act of 1831 respecting elections, although he was sworn to fulfil the duties of his office, when appointed. By that act it was made the duty of the sheriff to hold the elections, in certain cases, himself, and to decide upon the legality of votes; and an oath was prescribed applicable to his then duties. Now, all the elections are required to be conducted by superintendents, who alone decide upon the votes, and who are authorized to proceed without the presence of the sheriff; so that the oath prescribed has become inapplicable to the duties to be performed by the sheriff, if he thinks proper to attend, as it is still his duty to do. Two superintendents, it appears, did conduct the election all the time at this precinct; but it would seem that one of those who acted during a part of a day was not sworn. This was undoubtedly irregular and illegal; but the committee are not prepared, on that account, to set aside the election as wholly null and void, in a case where it appears to have been fairly conducted; where the name of every voter and his vote is recorded, so that if either party objects to him, the other is required to prove him legally qualified to vote; and where such objections have been actually made, and the votes rejected unless duly proven to be good. None of the cases cited by Mr. Botts, in his memorial, on this point, are like the case now before us. The committee recommend the following resolution:

Resolved, That John W. Jones is entitled to his seat in this House, as a representative from the sixth congressional district of the State of Virginia.

When the case came into the House a very brief debate ensued.

Mr. SCHENCK moved that the further consideration of the reports of the majority and of the minority of the Committee of Elections in this case be postponed until Thursday next.

Mr. S. proceeded to remark that, in order to get a full understanding of the grounds upon which the minority of the committee had come to the conclusion to which they had arrived, it seemed to him it was absolutely necessary that gentlemen should have an opportunity of examining the evidence. The minority, it was true, had concurred with the decision of the majority in its final result; but there remained a question regarding the qualification of votes, the decision of which would affect the legality of the election in many of the States. He had concurred in excluding the class of votes excluded by the majority, because the admission of such votes (under the qualifications prescribed by the States) would be rendering nugatory the power granted to the Congress of the United States—the States being permitted to admit to citizenship those who were not recognized as citizens in every respect, and particularly under the laws of the United States. It was true, it would cut off thousands of voters in Michigan and other States; and he would say to his New England friends that it would cut off the votes of all colored persons. If the kind of votes to which he had referred were allowed, Mr. Botts would have a majority of three or four votes, and consequently be entitled to the seat; but being excluded, Mr. Jones had a majority.

The vote was taken June 6.

Mr. ELMER said, as some explanation of the action of the committee might perhaps be expected from him, he would trouble the House with a very few brief remarks. He trusted the House would be as unanimous in its decision of this question as the committee had been. He argued that the committee could not have come to any other conclusion than they did, even if they had followed the requirements of the contesting candidate [Mr. Botts] himself, in regard to the allowance or rejection of votes. And he said, further, that it was a case which ought never to have come before the House, for there was no good ground on which the seat of Mr. Jones could be contested. He went into an explanation of the case at some length, and also of the action of the committee thereon.

Mr. NEWTON said both the majority and the minority of the committee had arrived at the same result respecting the right of the sitting member; but he went on to show that the contest on the part of Mr. Botts was not vexatious, nor frivolous.

Mr. HAMLIN also addressed the House, and complained of the course pursued by the minority of the Election Committee. He concluded by moving the previous question; which was seconded by the House, and the main question ordered to be put.

Mr. HAMMET called for the yeas and nays on the adoption of the resolution from the majority of the Committee of Elections, declaratory of the right of Mr. Jones to his seat, and they were ordered; and being taken, resulted thus: yeas 150, nays *none*.

TWENTY-NINTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. HAMLIN, Maine.
A. A. CHAPMAN, Virginia.
HARPER, Ohio.
CHASE, Tennessee.
DOBBIN, North Carolina.
Mr. ELLSWORTH, New York.
McGAUGHEY, Indiana.
CULVER, New Jersey.
CHIPMAN, Michigan.

BROCKENBROUGH *vs.* CABELL, OF FLORIDA.

Where votes given to a representative in Congress are required by State law to be returned within a specified time—held that the law is simply directory, and that votes returned after the time specified may be counted.

IN THE HOUSE OF REPRESENTATIVES.

JANUARY 7, 1846.

Mr. HAMLIN, from the Committee of Elections, made the following report:

The memorial of Mr. Brockenbrough claims that he was entitled to the commission of the governor at the time it was given to Mr. Cabell, upon the ground that of the votes then legally returned a majority was for him; and further, that of all the votes legally given at the election, a majority was also in his favor. Said memorial is as follows, addressed to the House of Representatives:

The memorial and petition of William H. Brockenbrough, representative elect from the State of Florida in the 29th Congress, respectfully shows—

That he claims the right to a seat in the House of Representatives, and to represent the people of Florida in the 29th Congress, and exhibits herewith the certificate of the secretary of state of Florida, under the great seal of the State, as conclusive evidence that at the time required by law for counting the votes returned to the office of the secretary of state, the majority of votes, by the lawful returns, was in favor of your memorialist.

Your memorialist further protests against and contests the right of Edward C. Cabell to a seat in the House of Representatives, or to represent the people of Florida in the 29th Congress of the United States—

First. Because he denies and contests the *election* of the said Edward C. Cabell upon the following grounds, to wit:

Because, at the election held in the State of Florida according to law, on the 6th day of October, A. D. 1845, for representative of the people of Florida in the 29th Congress, the greatest number of votes of the legally qualified voters of the State of Florida was cast in favor of your memorialist, and not in favor of the said Edward C. Cabell.

Secondly. This memorialist protests against and contests the right of the said Edward C. Cabell to a seat in the House of Representatives, or to represent the people of Florida in the House of Representatives of the 29th Congress—

Because he contests and denies the force, effect, and validity of the *return* of the said Edward C. Cabell, and claims that the same shall be wholly set aside and held for naught, as illegal, irregular, informal, and invalid, on the following grounds, to wit:

Because, at the expiration of thirty days after the election for representative in the 29th Congress, at which time the law required the returns in his office to be counted by the secretary of state, the greatest number of votes, by the lawful returns then in the office of the secretary of state, was in favor of this memorialist, and not in favor of the said Edward C. Cabell, as is shown by the certificate of said secretary, hereinbefore referred to. And the certificate which was given in favor of said Cabell, by the said secretary, upon which the commission of the governor was granted, was unlawful, erroneous, and wholly null and void, and did not represent to the governor the true state of facts; because the said secretary counted as in favor of the said Edward C. Cabell certain supposed votes of which there was no legal return in his office. Of all which said Cabell has had notice, a copy of which is herewith presented; and all of which is herewith presented and respectfully submitted by your memorialist.

W. H. BROCKENBROUGH,
Representative elect of the people of Florida in the 29th Congress of the United States.

There is no law of the United States regulating the mode and manner of proceedings in cases of contested elections. The law of the State where the parties reside is therefore resorted to, so far as it may be applicable, as the rule by which your committee is directed. By the law of Florida, it is provided that any candidate who shall contest the election of any person to the senate or house of representatives of that State shall give notice thereof, in writing, to the person whose election he contests, within ten days after the canvass of county clerks, and within thirty days after the canvass of the secretary of state. It was made the duty of county clerks to canvass the votes given for officers in their several counties, and the secretary of state to canvass the votes for officers who were elected by the whole State; and it was competent for Mr. Brockenbrough to give the notice required by law within thirty days after the canvass of the secretary of state.

On the 19th day of November, A. D. 1845, Mr. Cabell was notified by Mr. Brockenbrough, agreeably to the requirements of law, the canvassing of said votes having taken place on the 6th of said November by the secretary of state, and was by him certified to the governor. A copy of said notice is annexed, marked A. The notice was objected to as insufficient by Mr. Cabell, but your committee were of a different opinion.

The law of Florida, approved July 26, 1845, "prescribed the time, place, and manner of electing representatives to Congress," &c. Chapter 16, section 2, provides "that the returns of said election for representative in Congress shall be made to the secretary of state of this State, who shall count the same at the expiration of thirty days after the election, and certify the result to the governor of the State, who shall commission the person receiving the greatest number of votes."

At the expiration of said time the secretary of state did so count said votes, and certify the same to the governor of Florida, accompanied by a tabular statement of the return of votes then made to him. The governor, upon the certificate and accompanying tabular statement of votes made to him by the secretary of state, on the 6th day of November issued his commission to Edward C. Cabell. A copy of that commission is annexed, marked B.

Mr. Brockenbrough presented to the committee a copy, duly attested, and under the seal of the State, of the tabular statement of the votes, certified by the secretary of state to the governor, in the manner before named. That paper was admitted as evidence by the committee, and without objection from any one. A copy of that paper is annexed, marked No. 1.

He also offered certified copies of returns from the counties of Santa Rosa, Washington, Hillsboro', and Columbia, made to the office of the secretary of state, by judges of probate, after the expiration of thirty days, and after the secretary of state had made his certificate to the governor. Copies of these papers are annexed, and marked Nos. 2 and 6. They were admitted as evidence by the committee.

He further offered to the committee certified copies of the returns made by inspectors of elections to the secretary of state, after thirty days from the precincts of Key West and Tortugas, in the county of Monroe, and Brandy Branch, in the county of Nassau. These papers were received in evidence by the committee, and copies are annexed, marked Nos. 3, 4, and 5. But the committee refused to count or allow the votes returned in said papers. Mr. Brockenbrough also presented a paper marked 2; but it was not considered as evidence by your committee.

To understand the evidence contained in the foregoing papers, it becomes necessary to examine the laws of Florida for the purpose of ascertaining who are the officers created and directed to make the returns of votes given at an election for representative in Congress. Tabular statement No. 1 presents the evidence of returns made by three classes of persons, to wit: judges of probate, county

clerk, and by other persons supposed to be inspectors of elections; and the evidence offered by Mr. Brockenbrough consists of two kinds of returns—one made by judges of probate, and the other by inspectors.

What officers, then, by law were created and directed to make returns of said election? and what votes returned by the various officers should be counted and allowed?

The following extract from the laws of Florida, approved March 15, A. D. 1843, define the manner of holding elections, and who shall make return of votes; which law, in the opinion of your committee, together with another law, (being chapter 16,) already referred to, constitutes the law governing elections and return of votes. The constitution provides that all laws and parts of laws now in force, or which may be hereafter passed, while Florida was a Territory, not repugnant to the constitution, shall continue in force until, by operation of their provisions or limitations, the same shall cease to be in force, or until the general assembly of the State of Florida shall alter or repeal the same.

Sections of the law of Florida, passed March 15, 1843, providing for the election of officers, are applicable to this case.

* * * * * *

The territorial law of 1843 is clear and explicit in its terms. It empowers county clerks to order elections for *county officers*, to appoint inspectors to hold elections, and make returns of said elections to the county clerk; and for the clerk to certify the votes so returned to him to the secretary. It contains, in fact, all the necessary provisions for ordering, holding, and perfecting elections of county officers.

The law of July, 1845, providing for the election of representative in Congress, directs that representatives in Congress shall be elected in the same way as county officers; and the 6th section of the act transfers to judges of probate the same powers and duties, in relation to the ordering, holding, and perfecting elections, that were conferred upon county clerks.

There can, then, be no doubt that judges of probate were the officers legally authorized and directed to order this election, appoint inspectors, and make returns of the same, unless the provisions of the foregoing law are changed or modified by some other act.

There is no law altering or changing the same, unless it be an act passed by the Territory of Florida, March 11, 1845, "to facilitate the organization of Florida."

There was a territorial law, approved March 11, A. D. 1845, entitled "An act to facilitate the organization of Florida" That law, in the opinion of your committee, does not change the laws before referred to. It was a special law, designed for a special purpose; that purpose having been effected, the law ceases to have any further force or effect. It provided only for the election of certain State officers, on the admission of Florida into the Union, and also for a representative in Congress. That representative was so elected, and resigned his seat. The legislature elected under the operations of that law passed the act of July 26, A. D. 1845, chap. 16, under which this election was held. It will be borne in mind that said law did *not* provide for the election of any county officers. It repealed all laws inconsistent with it; but that repealing clause could not apply to a law regulating county officers, for it contained no provision in relation to, or providiug for, the election of county officers. It was a law to facilitate the organization of Florida, and directed county clerks to appoint inspectors of election to elect certain officers therein named. The law of July 26, 1845, subsequently passed by the legislature of the State of Florida, and under which this election was held, provides that representatives in Congress shall be elected in the same way as county officers—and could not, therefore, refer to the said law of March 11, but to the law of 1843, providing for the election of county officers.

The territorial act of 1845 (March 11) does not conflict with the law of 1843,

But it is further alleged by Mr. Farlee that, on the 13th day of March, 1844, the legislature of New Jersey passed an act in these words:

SEC. 7. *And be it enacted*, That in all cases where any person or persons have left, or shall leave hereafter, their home or place where they reside, to attend any academy, college, theological seminary, or other literary institution, in any township, borough, or city of this State, for the purpose of obtaining an education or instruction, that absence for such purpose, while so attending such academy, college, or theological seminary, or other literary institution, shall not constitute a change of the place of residence of such person or persons, so as to make him or them liable to be taxed, or to entitle him or them to vote at any election in such township, borough or city, where such college, academy, theological seminary, or other literary institution is situated.

Under this statute, the memorialist alleges that the students were expressly prohibited from voting at said election.

Your committee entertain a decided opinion to the contrary; for in the first place, all doubt is at once removed by the conclusive circumstance that the said act was passed the 13th day of *March*, 1844, and *the new constitution under which this election was held went into operation in September*, 1844; *the election taking place in November*, 1844. The new constitution (the fundamental law) was adopted after that act, and the election was held *after* the adoption of the new constitution—a constitution, in many respects, more liberal than the old one.

In the "schedule," article 10, section 1, of said constitution, is found the following: "The common law, and statute laws, now in force, not repugnant to this constitution, shall remain in force until they expire," &c. Is not the statute excluding students from voting "*repugnant to this constitution*," which says that "*any* white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of the State one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote," except certain persons therein enumerated—*students not* being excepted? But a newspaper was exhibited by Mr. Runk, purporting to contain a report of the proceedings of said convention, in which it appears that a member of the convention moved an amendment to the article of this new constitution in regard to the "right of suffrage," so as to exclude "students who had taken up a transient residence for the purposes of education;" and after some discussion, generally denouncing the proposition, the motion *was withdrawn*. It is proper to state that the reporter of these proceedings was not employed by the convention, and merely reported for the paper in which he was interested; but that *his deposition accompanies the paper*, in which he swears that the report is substantially correct; that his paper was placed on the desks of the members, and that he never heard any complaint against it. The extract of the entire debate relative to this subject is appended to this report and marked C, and will aid in properly construing the *new constitution*.

Your committee would also remark, that the old constitution of New Jersey required voters to be "inhabitants" of the State, and to have "*resided*," also, a certain time in the State. The new constitution is different; and the proceedings of the late convention show that the word "inhabitant" was used in the committee's report, but finally stricken out, and the word "resident" substituted.

It was suggested by the contestant that the legislature which sat in 1845 repealed that act, and that, therefore, it must have been considered as in force in the fall of 1844. But even that slight circumstance is deprived of any weight when the *manner* of the repeal is considered. There was no special act passed in 1845, directed particularly to the repeal of *that 7th section*. But in the act that was passed in 1845 to regulate elections under the new constitution, amongst other acts that were repealed was an act passed in March, 1844, containing *nine sections*, the *seventh* section being the one relating to students.

Many of the sections were probably "not repugnant" to the "new consti-

tution," and had to be repealed, and the act that was passed repealed the whole act of nine sections, in general terms, without specifying any particular section.

That section of the act was, in the opinion of your committee, clearly repugnant to the new constitution, and, of course, not in force. But even if that statute were still in force, from the depositions of those students in regard to their *residence* at Princeton—most of them swearing that they left the place they came from *animo non revertendi*, and that they consider Princeton their residence, and pay taxes there—your committee are not prepared to say that they would be excluded from the right of voting; for surely the legislature of New Jersey could never have been so unfriendly to the cause of learning as to have meant to exclude students from voting, *merely* because they were students, whether they were residents or not.

The contestant, in his memorial, refers to a decision of the supreme court of New Jersey, and relies on that case as authority on the question of residence. It was the case of Cadwallader *vs.* Howell and Moore, decided in *November*, 1840, prior to the adoption of the new constitution.

Your committee have examined the report of the case, and read with care the opinion of the learned judge, and are not disposed to question its correctness. The following is the abstract of the case, as made by the reporter: "The residence required in the laws of this State to entitle a person to vote at an election means his fixed domicile, or permanent home, and is not changed or altered by his occasional absence, with or without his family, if it be *animo revertendi*. A residence in law, once obtained, continues without intermission until a new one is gained."

But although the learned judge, in delivering his opinion, says that students of our colleges, and hundreds of others scattered on land and sea, engaged, for the time being, in the prosecution of some transient object, are considered in law as residing at their original homes, he also lays down this to be the law: "The place where a man is commorant may, perhaps, be properly considered as *prima facie* the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leave his original residence *animo non revertendi*, and adopt another, (for a space of time, however brief,) if it be done *animo manendi*, his first residence is lost. But if, in leaving his original residence, he does so *animo revertendi*, such original residence continues in law, notwithstanding the temporary absence of himself and family."

From a consideration of the law thus expounded, and of the depositions of the persons who voted, your committee are of opinion that they had a right to vote; for they swear that they left their last residence *animo non revertendi*, and adopt Princeton as their residence for a space of time—not very brief, not certain as to its duration—undetermined in their minds as to the adoption of any other particular residence should they choose to abandon Princeton.

Your committee suggest that the remarks of the learned judge, in reference to students, may well apply in the cases of, perhaps, a large majority of the young men at Princeton, who went there for a temporary purpose, *meaning to return home* when that purpose was accomplished. But of the one or two hundred students, the *few* who voted were, in the opinion of your committee, exceptions, and *without* the rule, and were permitted to vote by the judges of the election, after a consideration of the objections raised in many of the cases.

It may not have been *discreet* in students to venture at all into the arena of politics, and it *may* not have been the most creditable conduct, particularly for students of theology, to refuse to disclose for whom they voted; but the inquiry of the committee was solely confined to ascertaining whether they had a right to vote. But if the House should be of opinion that they were *not legal voters*, it will then become necessary to ascertain *for whom* they cast their votes.

Messrs. Richardson, Scudder, Goodman, and Lorance acknowledged in their depositions that they voted for *Mr. Runk*, and Mr. Garthwait that he voted for Mr.

Farlee; so that, of the nineteen students who voted, and whose depositions were taken, four acknowledge under oath that they voted for Mr. Runk, and one that he voted for Mr Farlee—leaving the votes of the other fourteen to be ascertained, if possible, by a resort to other testimony. And if it be decided, from the depositions hereunto appended and marked D, that these fourteen also voted for Mr. Runk, it would elect Mr. Farlee by a majority of two votes. The arguments of Mr. Farlee and Mr. Runk, submitted to the committee, are appended to this report, and marked E and F.

Your committee, having decided that the votes were legal, resolved to report the case to the House, accompanied with all the depositions taken relative to the political character of the voters, in order that, in the event of a decision by the House that the votes were illegal. its judgment may be at once pronounced on the sufficiency or insufficiency of the proof as to the character of the votes cast.

Your committee recommend the adoption of the following resolution:

Resolved, That Isaac G. Farlee is not entitled to a seat in this house as a representative from the State of New Jersey.

After a very brief debate the House voted that the contestant was not enti tled to the seat, 119 to 66. Mr. Hamlin, of Maine, then offered a resolution that Mr. Runk, the sitting member, was *not* entitled to the seat. The vote stood, ayes 96, noes 96. The Speaker voted no, which left Mr. Runk in his seat.

NOTE.—See vol. 15 Cong. Globe, pages 437, 438, 448, 454, and 456.

TWENTY-NINTH CONGRESS, SECOND SESSION.

BAKER, *of Illinois*—YELL, *of Arkansas*.

Holding an office in the army of the United States is incompatible with holding a seat in Congress.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 26, 1847.

Mr. MCGAUGHEY, as a question of privilege, from the Committee of Elections, of whom Hon. Hannibal Hamlin was chairman, to whom was referred, by the resolution of the House, the question of Edward D. Baker's right to a seat as a representative from the State of Illinois in the twenty-ninth Congress, and also the right of Thomas W. Newton to a seat as the representative from the State of Arkansas, in place of Archibald Yell, made the following report:

The Committee of Elections, to whom were referred two resolutions of the House—the first of which was adopted on the 2d [5th] January, 1847, and required the committee to inquire and report whether Hon. Edward D. Baker, a representative from the State of Illinois, having accepted a commission as colonel of volunteers in the army of the United States, and being in the service of and receiving compensation from the government of the United States as such army officer, has been entitled, since the acceptance and exercise of said military appointment, to a seat as a member of the House of Representatives; the second, adopted on the 6th day of the present month, by which Thomas W. Newton was admitted to a seat and sworn into office as a member of this Congress, and his credentials of election referred to this committee—report:

That, under the second resolution, they have inquired into and ascertained the following to be the facts: that Archibald Yell was regularly elected as a

member of the twenty-ninth Congress from the State of Arkansas; that some time in the month of July, 1846, he accepted a commission as colonel of volunteers raised in the State of Arkansas under an act of Congress approved May 13, 1846; that the commission thus accepted was made out by the State authorities, but that Colonel Yell and the volunteers under his command were, in said month of July, mustered into the service of the United States; that he yet continues in the service of the United States as a colonel, and receives his pay from the government of the United States. And that Thomas W. Newton was, on the 14th of December, 1846, elected a representative in the twenty-ninth Congress from the State of Arkansas. To use the language of his certificate of election, he was elected "to fill the unexpired term of Archibald Yell." The committee have no legal evidence before them that Archibald Yell, at any time before the election of Mr. Newton, resigned his seat as a member of Congress. The committee are of opinion that the facts above enumerated present precisely the same question for their consideration, under the second resolution, as is presented by the House in the first resolution; and therefore it is that the committee have thought it proper to make a joint report upon both resolutions.

The committee are of opinion that under the fifth section of the first article of the Constitution of the United States the House has the right to ascertain and decide upon all questions of law and of fact necessary to be ascertained and decided in order to enable it to determine upon the right of each individual who may claim to be one of its members. And hence the committee instituted an inquiry into the facts of the case referred to them by the second resolution, for the purpose of ascertaining *whether such a vacancy existed* as entitled the people of Arkansas to elect a successor to Mr. Yell.

The committee are of opinion that the Hon. Edward D. Baker has not been entitled to a seat as a member of the twenty-ninth Congress since the acceptance and exercise of the military appointment referred to in the resolution of the House; and that at the time of the election of Thomas W. Newton *there existed a vacancy* from the State of Arkansas, *occasioned* by the acceptance by Archibald Yell of a commission to serve as a colonel of volunteers in the army of the United States.

The sixth section of the first article of the Constitution of the United States provides that "no person holding any office under the United States shall be a member of either house during his continuance in office." The question then arises, are the offices which have been accepted by these gentlemen *offices under the United States*, within the meaning of the Constitution? We think they are. If it be urged that the commission is derived from the State authorities, the answer is, that a commission does not confer the office; it is only the *evidence* of the right to exercise its functions. The commissions of members of Congress, or, in other words, their certificates of election, are derived from the State authorities. Like the colonels, whose cases are now under consideration, their services are rendered to the United States, and they are paid by the United States, but their commissions are derived from the State authorities. It seems to the committee that the question whether the office is held under the United States or under a State, does not depend upon the question who gave the commission, made the election, or conferred the appointment, but upon the question, what are the duties to be performed, the government for whom they are to be performed, and to what government is the office responsible for a failure to perform? Testing the offices in question by this standard, and there can remain but very little doubt. These colonels perform like services with those of the regular army. They are responsible to the laws of the United States for the manner in which they discharge the duties of their offices.

The committee believe that to hold an office in the army of the United States is incompatible with the office of a member of Congress, and that, therefore, the two offices cannot be held at the same time by the same individual; that it

say they are legal returns; another portion were made by county clerks; the majority of the committee said they were legal; and another portion giving to the sitting member [Mr. Cabell] 370-odd votes, and to the contesting member [Mr. Brockenbrough] some 180 votes, which were made by inspectors directly to the secretary of state. He was for receiving and counting every vote of all these returns, no matter what was the result which was arrived at thereby. There were additional returns made by judges of probate to the secretary's office after the thirty days: the contesting member presented certified copies of them, and they were allowed by the committee. The contesting member also presented returns made by inspectors of elections in Monroe county. These were made directly to the secretary of state, but after the thirty days, and were by the secretary certified to this house; and as one of the committee, arriving at the conclusion of the secretary of state, he (Mr. H.) went for counting these votes, and for his life he could see no distinction between counting the same class returned to the governor within the thirty days, or those which were returned after the thirty days.

* * * Again, the secretary of state was bound to certify all papers coming legally into his possession. The constitution did not provide that they should be legal papers in his possession; but that any paper legally in the possession of the secretary of state may be certified, and the paper thus certified have all the power of the original paper. He (Mr. H.) would have taken these returns from Monroe if they had never gone to the secretary of state; he would have traced back to that county and ascertained what were the returns made by the inspectors of the votes legally cast, and he would have received them in evidence. The strictly legal channel would have been for them to have gone through the judge of probate; but, nevertheless, they had been received, and legally received, by the secretary of state, and when certified by him they had all the effect of original papers. They were papers relating to the election of that State; they had gone to the secretary of state in a legal manner, and were certified to by him. Why, then, should not these votes, certified to in this evidence, be taken equally with the same class certified by the same officer to the governor, on which the commission had issued, and which had been received by the minority of the committee.

Mr. CHIPMAN, a member of the committee, argued against the report. He said:

"The first paper offered was the paper No. 1, to which the honorable chairman of the committee alluded. And here he begged leave to state that, on an inspection of that paper, it would be found that there were ***no returns in it***, as certified by the secretary of state, ***except returns made by probate judges.*** That might, perhaps, seem a broad assertion after the declaration of the chairman of the committee; but he should attempt to substantiate it. There was one return, purporting to have been made by a county clerk, which the secretary of state had expressly excepted and rejected. He wished the House, then, to bear in mind this fact, that there was no return in statement No. 1, on which the commission was issued, except returns by judges of probate. The committee had determined that the proper returns were those legally placed in the office of the secretary of state, and to which his certificate would give the force of evidence; that these were to be received as good returns, and these alone; and hence that inspectors' returns were not admissible. The question arose whether these inspectors, under their official oaths, could make these returns, and give them, when backed by the certificate of the secretary, the force and effect of legal evidence. The majority of the committee decided that they were illegal; that the inspectors had no right to send up such returns to the secretary of state, and, to use the language of the constitution, that they were not papers legally in the possession of the secretary of state, and, therefore, that his certificate could not give them the force of evidence. Under this rule of proceeding the decision would have given the election to the sitting member upon the evidence before the committee: and so it was declared, not by the ***now*** minority of the committee, but by the ***then*** majority of the committee."

Mr. CULVER (of the minority of the committee) addressed the House at some length in reply to Mr. Hamlin, and in explanation and defence of the positions of the minority report. That report, (he stated at the outset of his remarks,) which seemed to have been made the target for the shots of gentlemen who had participated in the debate, was originally drawn up by himself under the order of the committee as a majority report; but on the change of positions of gentlemen, members of that committee, which had been frequently alluded to, it was only necessary to alter the title and it became the minority report. Hence, it was due to the gentleman from Michigan, [Mr. Chipman,] who was one of the gentlemen whose signature was attached to it, to state that when it was announced that the chairman of the committee [Mr. Hamlin] intended to bring in his report as the majority report, the gentleman had not time to look over the minority report, but agreeing to its premises and its conclusions, he had concurred in it.

Mr. CULVER argued that there had not been received sufficient evidence to counterbalance the ***prima facie*** evidence of the commission of Mr. Cabell; that the evidence of the returns, subsequent to those made to the secretary of state within the thirty days required by law, brought forward by Mr. Brockenbrough, was to be considered as ***ex parte*** and inadmis-

them: this determines the officer to be ours, the officer of the United States *pro hâc vice.* A State militia officer, mustered into the United States service, *ipso facto* becomes an officer of the United States, and so continues until discharged from that service. If an officer of the United States, it is clear he is not qualified to hold a seat on this floor.—(*Con. U. S., art.* 1, *sec.* 7, *clause* 2.)

Who is to determine this fact? If Governor Yell is not now a member, it is because he has disqualified himself since his election and admission here to a seat. The gentleman from South Carolina [Mr. Woodward] contends, that as the Constitution declares, in case of vacancy, that the executive authority of the State in which the vacancy occurs shall issue the writ of election, that, therefore, the executives of the States are to determine the fact of vacancy, and that in this instance the executive of the State of Arkansas has determined the matter by ordering an election and giving a certificate to the present applicant. I apprehend, sir, this is a matter of "qualification;" and on turning to the Constitution, (art. 1, sec. 5, clause 1,) I find that "each house shall be the judge of the election returns and *qualifications* of its own members." If there be a vacancy, it is because of disqualification—the commission of some act of disqualification by Mr. Yell. If there be any such commission, the gentleman being a member of this house, this house must judge of such act, pass upon it, and if they find the fact, declare the vacancy.

Mr. C. said, from what he had said it would be understood, that if Mr. Yell has occupied the office referred to, he was prepared to vote it one of disqualification, and the office vacant, and admit the present applicant to his seat upon the executive certificate. But as we have not been officially informed that the facts exist as stated, Mr. C. desired and hoped the matter would go to the Committee of Elections, to ascertain and report the facts to the House, that they might act understandingly.

Mr. SCHENCK said there were two questions which might arise for the consideration of the House not necessarily connected or involved in each other, however, and only one of which they were now called upon to decide. The one was the right of Mr. Newton, the member elect, to *take* his seat; the other might or might not afterwards arise whether he would be entitled to *hold* it, either as against Colonel Yell or any other contestant who might hereafter appear.

It was not necessary, perhaps, at this time, to anticipate a decision upon the latter inquiry. On that point, though, his own mind was fully made up. He believed that the former member, by the acceptance of his commission as colonel, and entering the army and service of the government in that capacity, was "holding an office under the United States," and had disqualified himself from retaining his seat. This had been distinctly decided even in the case of a major of militia, in the instance of John P. Van Ness, of New York, cited by the gentleman from North Carolina, [Mr. Graham.] If true in such a case, how much more forcibly would both the letter and the reason of the constitutional prohibition apply to an officer of volunteers! This corps of volunteers was an anomalous sort of force in its character; and there might be doubt yet whether it was allied most nearly to the militia or to the regular army, or identified with either of them. But these are facts. The militia is organized under the laws and institutions and authority of the several States, and when called into service, is called with its complete organization upon it into the employment of the general government. It is created as a part of the military force of the country by State legislation only. And yet, as we have seen, a militia officer, when in the service of the national government, was unanimously held by the House of Representatives, in a former Congress, to have forfeited his right to sit as a member. But the volunteer force owes its very existence and has its very beginning in the legislation of Congress. The act of last session originated and created that part of the present existing army. They are employed, provided, and paid by the federal government; and, by the very terms of that act, they are not only made "subject to the rules and articles of war," but it is declared that they "shall be *in all respects*, except as to clothing and pay, *placed on the same footing* with similar corps of the United States army."

The honorable gentleman from Illinois [Mr. Douglas] has clearly stated and argued this view of the subject, and I will not follow it up. The House will remember that I presented the same views, and made the argument somewhat more at large, some weeks ago, when I took occasion to offer a resolution of reference and inquiry in the case of Colonel Baker. Neither will I now insist, as might be done if that branch of the question were necessarily under consideration, upon the utter incompatibility of the two offices—military and legislative. Only take one illustration of the manner in which they might conflict. Suppose, at the same time, the gentleman formerly here from Arkansas should be claimed as a member of this house and as a colonel of volunteers. There might be a call of the House which would require and enforce his appearance here; while, by his superior in command in the army, he should be ordered to march to the storming of Monterey or San Luis. Whom should he obey? The duties could not be both performed. If he disobeyed us, we should have him in the custody of the Sergeant-at-arms; if he disobeyed General Taylor, he would be marched under arrest, in charge of a file or platoon of soldiers! There would be a pretty strife and controversy! The Sergeant-at-arms would hold on to the truant *member;* the soldiers would insist upon their forcible possession and control of the person of the deserting *colonel!* It would be more than a case where "doctors disagree." It is pretty certain that our legis-

lative authority and interests would be the most likely to suffer, and be disregarded. To say nothing of the stronger impulses of gallantry, which would be so likely to lead the colonel to the field where glory was to be won, the contest would be a very unequal one. The enforcing penalties greatly differ. The House would but fine the absentee, or at most censure him for contempt of its authority; a court-martial might order him to be shot. Here was a difficulty not to be possibly reconciled upon any supposition that the two offices—the two services, military and civil—are at all compatible. But Mr. S. had said he would not argue the disqualification of Colonel Yell to hold his seat at this time. He would be glad if that question, as well as the right of Mr. Newton to take the seat, could at once be settled by a direct vote of the House. It was a question which involved the independence of Congress—its independence of executive encroachment or intrusion. He was sorry that the Committee of Elections, to which his resolution, suggested by Colonel Baker's case, had referred the inquiry, had not yet found time to report. He had hoped they would do so before this case from Arkansas, which was also anticipated at the time of offering that resolution, had come up. He hoped they would yet report.

But let all that pass now. The immediate question to be resolved is, the right of Mr. Newton to take his seat at this time, upon the credentials which he has presented. He thought there could be no reasonable doubt of that right—certainly none, if respect was to be paid to the uniform practice of the House in all time heretofore.

Mr. S. agreed with the honorable gentleman from South Carolina, [Mr. Woodward,] that while this house was the exclusive judge, under the Constitution, of "the election returns and qualifications" of its own members, there was a difference between that and the judgment as to the existence of a vacancy. In this instance there was no question either as to the election, the return, or the qualifications of Mr. Newton. Those points were all undisputed. But was there a vacancy in the representation of his State to be filled? Now, he could not agree with the gentleman from South Carolina, that this house had no judgment at all in that matter to be exercised. There seemed to him (Mr. S.) to be a concurrent power of deciding that point in the State authorities and in the House. He thought that while the authorities of a State were to determine upon ordering an election to fill a vacancy in their representation here, and thus must necessarily judge as to the existence of that vacancy, this house also was, to some extent, to judge whether there was a vacant seat to be filled. Resignations were seldom, if ever, announced to the House, but were made to the governors of the States; and so it was most likely to be, whenever vacancies occurred from any other cause. The House never certified vacancies to the States in whose representation here they occurred. It was not necessary, any more than it was usual, to do so. And it was never surely intended, or to be apprehended, that upon such failure to certify the State or district should go unrepresented. If that were so, it would be in the power of a member, by leaving the country, or possibly by expatriating himself, swearing allegiance to a foreign government, or otherwise disqualifying himself, neglecting or refusing to resign, or to even give notice to the House or its Speaker, to deprive his constituents of all benefit of representation. The States, and State authorities, and people, must be expected to look after their own right of representation, and keep it full. For this purpose they must look to vacancies when they should happen in that representation, and hold elections to supply them. They might be trusted, they always had been trusted to do this. And yet the House must exercise, to some extent, a judgment also in the matter.

In this view he saw no difficulty in the objection which troubled some gentlemen, that it left so far to the States or State authorities to judge, two members or more might be sent to fill the same seat. Not so; or if such a case did arise, it could present no practical difficulty. Take the instance now in hand, to illustrate. The State of Arkansas constitutes one congressional district. Mr. Yell (now Colonel Yell) was elected and sent here to represent the people of that State at the commencement of this Congress last session. Suppose he were here in his seat yet, instead of that seat being empty, as it is, and Mr. Newton were to come with his certificate from the governor of Arkansas, accrediting him as a successor to fill the unexpired term of Mr. Yell. The seat being occupied, the House would take notice of that fact. Here, then, would be two gentlemen, each with credentials from the proper authority, each of the certificates good upon its face, and containing *prima facie* evidence of the right to the seat. The House must determine between these proofs. The *presumption* would clearly be in favor of the sitting member—the occupying claimant—and the oldest title; the title-papers being otherwise the same and of equal validity.

It was upon such *superior presumption* that the House was continually acting. The first intimation—at least, the first official intimation—the first information upon the record which this house generally had of a vacancy, was the appearance of a successor to fill the unexpired term of the former incumbent. It was so always in case of a death of a member during the recess. Take the case occasioned in this Congress by the death of a member from Alabama, [Mr. McConnell.] His successor [Mr. Bowdon] appeared here, at the first of this session, with credentials just like those of Mr. Newton, and was permitted, as he should have been, and as a matter of course, to take his seat; and some days afterward, according to usual custom and courtesy, that gentleman made the first official announcement of the death of his predecessor, which had made the vacancy for him to fill. Another honorable gentleman from Alabama, [Mr. Cottrell,] he thought, had been peculiarly unfortunate in putting himself as an objector to Mr. Newton's admission. That gentleman [Mr. Cottrell]

had made as able and ingenious an argument against the right of the member elect as the case was capable of; but did it not occur to him that his own case was an instance directly against him? He [Mr. Cottrell] had been elected to fill a vacancy occurring in this very Congress by the resignation of Mr. Yancey; and the first official notice of that resignation, and the only notice, was contained in the certificate from the governor of his State, which the gentleman himself presented, and upon which, without a question, he had been allowed to fill the vacant seat.

But the gentleman, [Mr. Cottrell,] upon his (Mr. S.) suggesting this to him while he was speaking, saw that the authority of his own case was clearly against him, and sought to get rid of it by replying, that if *he* was improperly admitted, it was no reason why Mr. Newton should be. "Two wrongs," he said, "could never make a right." But (said Mr. S.) though two wrongs nor any number of wrongs can ever make a right, yet surely a great many right decisions, uniformly made and concurred in through a long succession of years—indeed, ever since the organization of the government and Congress—ought to be considered as settling the practice and the law, if ever any question could be settled. Such was the action of the House in at least two other instances at this very session of Congress. He alluded to the cases of Colonel Price, of Missouri, and Colonel Davis, of Mississippi, whose successors had been admitted to their seats here without question, and only upon the proof of vacancy contained in the fact of their own election, and in the credentials which they had produced. Cases might be multiplied without end. The *prima facie* case in such instances had always been considered sufficient and conclusive as to the right to *take the seat*, whatever might follow afterwards upon the question as to whether a vacancy had existed to be filled or not. The State determines that for itself, and sends the successor, and the House acts upon the weight of *presumption* which then arises in favor of the member elect.

Now, what were the presumptions in this case? Here was Mr. Newton, presenting himself with proper and authentic credentials, in due form, reciting the vacancy which he was elected to fill. It was all the proof we wanted—all the case he needed to make out. The proof and presumption of vacancy was all in his favor; and there was no sufficient presumption to oppose against that certificate and his right derived under it. It was true the House knew that the seat had formerly been held by Mr. Yell. But that was all. The House now knew that the seat was in fact empty; that Mr. Yell had left his place in fact before the end of last session, some time in June or July, perhaps, and had never occupied the seat since. It happened to be notorious, also, whether we had or had not yet official knowledge of the fact, that he had become a colonel in the service of the government, and was now with the army in Mexico. Moreover, it was also the fact, he believed, in the case of Colonel Price, that he had settled with the Sergeant-at-arms for his pay as a member of Congress up to the day of his leaving here last session, and had never claimed a dollar since. He had not, like some other gentleman, in like case, continued to draw his pay as a member after the time of his leaving Washington. But it was unnecessary to multiply these presumptions in favor of the vacancy. In the absence of Colonel Yell, the certificate of the governor of Arkansas, presented by Mr. Newton, was enough, and was to be taken as evidence of the fact. These other circumstances were only cumulative proof for the House to consider, if necessary, corroborating the fact established by the production of these last credentials.

Mr. S. concluded by expressing a hope that the House would not, by refusing Mr. Newton his seat, or to be admitted to be sworn in immediately, do anything that might look like a disposition to disturb a wholesome, reasonable, clear, and long-settled practice of this house.

[It now appeared by an official statement, made in reply to a call of the House by the Adjutant General, of the names of members of Congress who had received commissions and been mustered into the service of the United States, that Archibald Yell was among the number.

As soon as this document was read, members withdrew all opposition.]

The previous question was moved by Mr. Norris and seconded. The main question was ordered. The amendment of Mr. Thomasson was agreed to; and thus amended, the resolution was adopted.

Mr. Newton was then qualified and took his seat.

THIRTIETH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. R. W. THOMPSON, Indiana.
J. MULLIN, New York.
L. B. CHASE, Tennessee.
N. BOYDEN, North Carolina.
Mr. JENKINS, New York.
VAN DYKE, New Jersey.
ROMAN, Maryland.

In the second session Mr. INGE, of Alabama, and Mr. WILLIAMS, of Maine were added to the above.

MONROE *vs.* JACKSON, *of New York.*

Where paupers voted for the sitting member, they having been admitted to the almshouse from another congressional district, the committee held that the *previous* residence of such paupers was their legal residence.

IN THE HOUSE OF REPRESENTATIVES,

MARCH 25, 1848.

The Committee of Elections submitted a report to the House, from which the main facts are quoted below.

The following facts are admitted by the parties in this case, to wit:

First. That the sixth congressional district of the State of New York is composed of the following wards in the city of New York, divided, respectively, into election districts, to wit:

The eleventh ward divided into six districts.

The twelfth ward divided into two districts.

The fifteenth ward divided into four districts.

The sixteenth ward divided into five districts.

The seventeenth ward divided into five districts.

The eighteenth ward divided into three districts.

Second. That an election for representative in Congress for said district was held on the 3d day of November, 1846, at which the sitting member, David S Jckson, and the contestant, James Monroe, were opposing candidates.

Third. That at said election, and from the returns of the several election districts of the several wards, David S. Jackson received a majority of votes over James Monroe of one hundred and forty-three.

Fourth. That the number of votes returned from the third election district of the eighteenth ward was as follows: For the sitting member, four hundred and sixteen, and for the contestant, one hundred and eighty-one.

Fifth. That the sitting member was, at the time of such election, president of the board of aldermen of the city of New York, and that the officers and keepers of the almshouse and city prison are appointed by the authorities of said city.

Sixth. That David S. Jackson was, at such election, the regular candidate of the democratic party, and James Monroe the regular candidate of the whig party.

Seventh. That Norman B. Smith was also a candidate of the same party that nominated David S. Jackson for a seat in the assembly of the State o New York, and was also an officer in the almshouse of the city.

Eighth. That Moses S. Jackson, a brother of the sitting member, was, at the time of such election, an assistant alderman of the said eighteenth ward.

These are the material admissions of the parties, which become important in a subsequent part of this case. In addition, the contestant alleges:

First. That one hundred and sixty-three paupers, and upwards, from the almshouse and hospital, in the eighteenth ward in the city of New York, voted at the third election district of said eighteenth ward for the sitting member, which paupers had not been admitted to said almshouse from the said third district of said eighteenth ward.

This is denied by the sitting member, who alleges that he is informed, and believes, that about one hundred electors, then "residing and having their actual residence" in said third district of the eighteenth ward, did vote at said election in said district and ward; but that he does not know for whom they voted. He has been informed, and believes, that a portion of them did vote

for himself and a portion for the contestant. He does not know the ward or district from which they were admitted to the almshouse, but believes that they resided in said district and ward before they became inmates of the almshouse, and had been in the habit of voting there.

The contestant also alleges:

Second. That nine persons, who were paupers in said almshouse on and previous to said election, voted in the second election district of the twelfth ward for the sitting member; and that none of said paupers resided in said district before they were admitted to said almshouse.

This is also denied by the sitting member, who alleges that some persons, originally from the said almshouse, and who had gone thence, in the spring of the year 1846, to a farm on Randall's island, in said second district of said twelfth ward, where they were then engaged in tilling said farm under the direction of Moses G. Leonard, almshouse commissioner of the State of New York, did vote at said second election district of said twelfth ward, at said election. He does not know for whom they voted. He insists that they were residents of said twelfth ward; that they were challenged at the time of offering their votes, and were only admitted to vote after having taken the preliminary oath required by the laws of New York, having answered all questions put to them by the inspectors, and having taken the final oath required by the constitution of the State of New York.

The contestant also alleges:

Third. That from *twelve to twenty-four* persons who were, at the time of said election, convicts, undergoing punishment at the city prison on Blackwell's island, voted in the *second* election district of the *twelfth* ward for the sitting member.

The sitting member denies that said number or any other number of persons were brought from the prison on Blackwell's island and voted for him at said election.

The contestant also alleges:

Fourth. That on the night previous to the said election between *three* and *four hundred* persons were taken from Blackwell's island on board of a sloop and located principally in the eleventh ward, with a view to their voting; and that all or many of them did vote at said election for the sitting member, when none of them were entitled to vote in said congressional district.

This is expressly denied by the sitting member.

The contestant also alleges:

Fifth. That *eight* or more foreigners, who were not entitled to vote, voted at the first election district of the twelfth ward for the sitting member.

This is denied by the sitting member.

The contestant also alleges:

Sixth. That *five* or more foreigners, who were not entitled to vote, voted for the sitting member at the second election district of the twelfth ward.

This is denied by the sitting member.

The contestant also alleges:

Seventh. That eight or more persons, not residents of the sixth congressional district of New York, voted in the twelfth or some other ward of the said district for the sitting member.

This is denied by the sitting member.

The contestant also alleges:

Eighth. That five or more illegal votes were cast for the sitting member in the sixteenth ward, of a district not specified.

This is denied by the sitting member.

The contestant also alleges:

Ninth. That one of the inspectors of the fifth election district of the sixteenth ward was absent during a great portion of the day of election; and that many

persons who were brought to said poll to vote were challenged, and refused to take the oath prescribed by law as to their right to vote; and that when the inspector referred to was away from the polls said persons were illegally admitted to vote by the remaining inspectors.

The sitting member alleges that he has no knowledge or information in relation to this charge, but admits that he has heard that (for a few minutes during the day) one of the inspectors in said district was necessarily absent, and insists that this should not invalidate the election in that district. He denies that any persons who had been challenged and refused to take the necessary oath were afterwards admitted to vote in said district.

The contestant also alleges:

Tenth. That an inspector of the first election district of the twelfth ward declared, after the election, that he "got two votes for Jackson; one by letting a ballot drop in the box when the vote was challenged, knowing him not to be a voter; another in canvassing the votes, when Jackson's name was evidently erased, and said it was only blurred."

The sitting member declares that he has no knowledge or information in relation to this charge.

The contestant also alleges:

Eleventh. That the sitting member was, at the time of said election, president of the board of aldermen of the city of New York, and that the officers and keepers of the almshouse and city prison are appointed by the authorities of said city.

The sitting member admits that he was the president of the said board of aldermen at the time of said election, but says that the said officers and keepers had chiefly, if not in every instance, been appointed previous to his election as president of the board.

The contestant also alleges:

Twelfth. That Norman B. Smith was, at the time of said election, a candidate for the assembly of New York, and also an officer in said almshouse; and that he was the candidate of the party which nominated the sitting member.

This is admitted by the sitting member.

The contestant also alleges:

Thirteenth. That one of the inspectors of elections of the third district of the eighteenth ward was appointed and qualified after the board of inspectors had organized and the balloting had commenced, and before the paupers had voted. That said appointment was made by the alderman or assistant alderman *alone*, who was a brother of the sitting member.

The sitting member denies that the appointment was made under the circumstances here charged. He admits that his brother was an alderman in said ward, and insists that if the appointment was made as charged, the election would still be valid, as there were two other competent inspectors.

The contestant also alleges:

Fourteenth. That the inspectors of election of said third district of the eighteenth ward, or a majority of them, admitted the paupers from the almshouse to vote because the said paupers "considered the almshouse their residence."

The sitting member denies that any decision was made by the inspectors in said district in regard to the right of the paupers *generally* to vote, but insists that when each one offered his vote it was refused, unless it appeared that he was then an actual resident in said ward.

The report continues:

The first question to which the committee think it necessary to turn their attention is that which arises under the law of New York, as to the right of the inmates of hospitals and almshouses to vote. That law provides that "no [redacted] be deemed to have *lost* or *acquired a residence* by being a student

in a college, academy, or any seminary of learning; nor by living in a *poor-house, almshouse, hospital,* or *asylum,* in which he shall be maintained at the public expense," &c. The plain meaning of this language is this: That the inmate of an almshouse, hospital, &c., neither *loses* the residence he had *before he went there,* nor *acquires* a new one *by going there.* He votes, therefore, upon his *former* residence—that is, in the district or ward where he lived *before he became an inmate* of the almshouse or hospital. He can under no circumstances be permitted to vote upon his *almshouse or hospital residence.* The committee are not aware that this position is seriously questioned. Independent of all legislation, these persons were not voters in the district in which the almshouse and hospital were located by reason of their residence therein. By the common law, living in an almshouse, or other place of public charity, for any length of time, would not create a residence, or give the pauper the rights of a resident in the town, ward, or city in which such charity is situated.

The committee reported the subjoined resolutions:

Resolved, That David S. Jackson is not entitled to his seat in this house, as a representative from the sixth congressional district of the State of New York.

Resolved, That James Monroe is entitled to the seat now occupied in this house by David S. Jackson, as a representative from the sixth congressional district of the State of New York.

The Congressional Globe gives the following report of the debate upon the report:

Mr. THOMPSON, chairman of the committee, proceeded to state the facts of the case, and the reasons why a majority of the committee had reported in favor of the contestant, James Monroe, and against the sitting member, David S. Jackson.

The contestant's case was principally based on an allegation that upwards of one hundred and forty-three paupers, from the almshouse and hospital in the eighteenth ward of the city of New York, voted at the third election district of that ward, from which they had not been admitted to those institutions, and where, it was argued, they consequently were not residents, and not entitled to vote; and that these, together with several convicts from Blackwell's island, and some other illegal votes, counterbalanced the majority of one hundred and forty-three votes, which the returns showed the sitting member to have received, leaving Mr. Monroe a majority of fourteen.

The minority of the Committee of Elections reported in favor of the right of Mr. Jackson. The right of paupers to vote was examined and maintained, n view of the laws and constitution of the State of New York; and the facts and the testimony on which the contestant maintained his claim were reviewed, and deemed insufficient to unseat the sitting member.

Mr. MURPHY said, the conclusions to which he had arrived, after a most careful examination of the case and the evidence, were so different from those of the majority of the committee reporting, and so conclusive to his own mind, that he would venture to lay them before the House. He might add another reason why he should trespass on the time of the House. It was because he had observed the most studious efforts made to prejudge this case—he would not say in this house, but through the public prints. These efforts had been made in every direction. From this source we have heard it repeated over and over again that immense frauds were perpetrated in the congressional district, the right of whose representative to a seat on this floor is now contested. It had been charged that even convicts were taken from the State prison and permitted to vote in this district. Not only had the contestant himself indulged in making this charge, but the majority of the committee, in their report, (notwithstanding the protestations of its chairman, Mr. R. W. Thompson,) have even gone out of their way to say that frauds of this kind have been perpetrated. He asserted that there was no case of fact in the evidence to warrant such a charge, either on the part of the contestant or the committee. But, on the contrary, there was ample proof that no such frauds were perpetrated at all, much less in the district at the election under consideration. To sustain this affirmation, he quoted from the report and printed evidence a number of extracts, all going to show, from an investigation before the grand jury of the city of New York, (where these alleged election frauds were made a subject of presentment immediately after the election,) that there was not a particle of proof to sustain the charge; but that, on the contrary, the fraud that was attempted was detected and prevented; and no such illegal voting as was charged did actually take place. He felt it his duty to say thus much, not only in justice to the sitting member, but to his State, where, though there were unprincipled men, as elsewhere, who might meditate an outrage on the ballot-box, there were also vigilant officers and citizens enough to prevent the successful perpetration of such frauds.

Mr. M. then went into an examination of the general facts of the case, stating first, particularly, that he disagreed with the *majority* of the committee both as to the law and the facts; and adding, *that, as he understood* the report, the chairman of the committee was

incorrect in his statement that the minority of the committee agreed with him as to the construction of the law.

He then read the suffrage qualifications by the constitution of the State of New York, which provides also where the elector shall vote. The qualifications of a voter are that he must be a free white male citizen, twenty-one years of age, a resident of the State one year and of the county six months. With these qualifications he has a right to vote, and he must vote in the town or ward in which he actually resides, and not elsewhere. This provision of the constitution speaks of the *residence* of the voter in the State and county, and makes a distinction between this and the place where he *actually resides*. The former was his residence in legal intendment, the latter the place where he happened to be at the time of the election. The latter was not a qualification for voting, but a direction where a qualified voter should vote.

Mr. M. then proceeded to deny the power of the State legislature to change a constitutional provision, and to show that the law of New York of 1842, which provides that no person shall be deemed to have acquired or lost his residence by remaining at school, consignment to an almshouse, or service in the army or navy, &c., was, in case it was construed to prevent a pauper in the almshouse from voting in the district where the almshouse was situated, who had been an inhabitant of the State for one year and a resident of the county six months, in conflict with the New York State constitution—giving several cases by way of illustration—and was therefore *pro tanto* void.

It was not contended by the minority that these paupers acquired a legal residence by being in the almshouse. They contended only that the almshouse was their actual residence. The constitution of New York intended to give all free white men, rich or poor, the right to vote; and a free black may vote if he possesses a freehold of the value of $250.

He then proceeded to show that even if the paupers were not entitled to vote, the sitting member still held a just claim to his seat. Because of an error in the figures of the majority report, he showed that the result should have been stated at 152 pauper votes for Jackson, instead of 157. The committee had charged Jackson, the sitting member, in the first place, with 162 pauper votes; they then admitted that five of these had voted for Monroe, the contestant. They deducted five from the 162 and charged Jackson with 157, but neglected to charge Monroe with five, or, what is the same, to charge Jackson with a net pauper vote of 152. This left Monroe's majority only nine, according to the figures of the committee.

Having taken off these five pauper votes, he proceeded to look at the balance, and showed how the 152 pauper votes were made up, making copious reference to the printed evidence, and criticising Mr. Eell's testimony in relation to these pauper voters designated in schedule C of the printed testimony. He showed that John McGowan, (or McGovern,) William Harrison, James Morrill, George Carr, and Daniel Moran—five names proved beyond question to be charged against the sitting member—were not in the almshouse at the time of the election, but had been discharged several weeks before the election. He mentioned also other seven names of this schedule, charged against the sitting member, who were never in the almshouse at all. He proposed to throw three of these out of the question, in consequence of imperfections in the almshouse register. Others were charged against the sitting member who were not admitted to the almshouse till after the election, and thus he added two names which he proposed to throw out of the question. He proceeded in these examinations to the close of the hour, showing in the total twenty votes thus improperly charged against the sitting member, which result would still leave him a majority of votes, the legality of which must be admitted by all.

The House sent the case back to the people, giving the seat neither to the sitting member nor the contestant. The vote stood 104 to 91.

NOTE.—See vol. 18, p. 643, Congressional Globe.

THIRTIETH CONGRESS, SECOND SESSION.

H. H. SIBLEY, *of Wisconsin Territory.*

The territorial government of Wisconsin was not merged in the State government, afterwards formed, but continued to have a legal existence over that Territory not embraced within the limits of the State after the admission of the State into the Union.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 2, 1849.

Mr. RICHARD W. THOMPSON, from the Committee of Elections, made the following report:

The act providing for the original organization of the Territory of Wisconsin was passed on the 20th April, 1836, and under this organization the Territory *yond the Mississippi* river, and included the present State of Iowa.

The Territory of Iowa was formed by an act passed June 12, 1838, out of all that part of the Territory of Wisconsin west of the Mississippi river.

By an act passed August 6, 1846, the people of the Territory of Wisconsin were authorized to form a constitution and State government, with a view to admission into the Union. This act fixed the following boundaries for the State of Wisconsin, to wit: "Beginning at the northeast corner of the State of Illinois, that is to say, at a point in the centre of Lake Michigan where the line of forty-two degrees and thirty minutes of north latitude crosses the same; thence, running with the boundary line of the State of Michigan, through Lake Michigan, Green Bay, to the mouth of the Menomonie river; thence up the channel of said river to the Brulé river; thence along the southern shore of Lake Brulé, in a direct line to the centre of the channel between Middle and South islands, in the lake of the Desert; thence in a direct line to the headwaters of the Montreal river, as marked upon the survey made by Captain Cramm; thence down the main channel of the Montreal river to the middle of Lake Superior; thence through the centre of Lake Superior to the mouth of the St. Louis river; thence up the main channel of said river to the first rapids in the same, above the Indian village, according to Nicollet's map; thence due south to the main branch of the river St. Croix; thence down the main channel of said river to the Mississippi; thence down the centre of the main channel of that river to the northwest corner of the State of Illinois; thence due east with the northern boundary of the State of Illinois to the place of beginning, as established by 'An act to enable the people of the Illinois Territory to form a constitution and State government, and for the admission of such State into the Union on an equal footing with the original States,' approved April eighteen, eighteen hundred and eighteen."

Pursuant to the provisions of the aforesaid act of August 6, 1846, the people of Wisconsin formed a State constitution, in the first article of which provision was made for a change of boundary, with the consent of Congress. This consent was given by the act of March 3, 1847, which fixed the boundary as follows, to wit: "Leaving the boundary line prescribed in the act of Congress entitled 'An act to enable the people of Wisconsin Territory to form a constitution and State government, and for the admission of such State into the Union,' at the first rapids in the river St. Louis; thence in a direct line southwardly to a point fifteen miles east of the most easterly point in Lake St. Croix; thence due south to the main channel of the Mississippi river or Lake Pepin; thence down the said main channel, as prescribed in said act."

The Territory of Wisconsin remained with these boundaries, and under the organization provided in the act of April 20, 1836, until the passage of the act of May 29, 1848, entitled "An act for the admission of Wisconsin into the Union." This act changed the boundary as consented to by Congress in the act of March 3, 1847, and admitted the *State of Wisconsin* into the Union, with the boundaries prescribed by the act of August 6, 1846. Thus the northern boundary of the State is the St. Croix river.

By the adoption by Congress of the St. Croix river as the boundary, a portion of the inhabitants who had enjoyed the advantages of the territorial government of Wisconsin were left out of the *State* of Wisconsin. This number is represented as about four thousand, embraced within the limits of a judicial circuit and a complete county organization. They had participated in the election of a delegate to Congress, under the act organizing the Territory, and were, at the passage of the act of May 29, 1848, represented in Congress by the Hon. John H. Tweedy, who was, at that time, the delegate from the *whole* Territory. This gentleman—to remove any doubts that might exist as to the tenure of his office—resigned his seat as delegate on September 18, 1848. On the 9th day of June, 1848, the regularly elected representatives from the *State* of Wisconsin took their seats as members of the House of Representatives. It

will be seen, therefore, that the inhabitants who reside beyond and north and west of the St. Croix river were left without representation in Congress.

They have supposed themselves entitled to and have ever since enjoyed the benefits of the organic law provided for the government of the *Territory* of Wisconsin. That portion of country is now known as the Territory of Wisconsin. It could not be otherwise known, for that name having been originally given to it by act of Congress, it can assume no other.

Before the admission of the State into the Union, the Hon. Henry Dodge was the governor of the Territory, and the Hon. John Catlin secretary. By the act of April 20, 1826, it was provided that, upon the death, removal, resignation, or necessary absence of the governor, the secretary shall perform the duties of that office. Upon the election of Governor Dodge, therefore, to the Senate of the United States, Governor Catlin became the acting governor for the Territory. He accordingly fixed his residence at Stillwater, which is situated within the Territory not embraced in the State, and beyond the St. Croix river. Deeming it his duty to do so, and the people of the Territory thinking themselves entitled to a delegate in Congress, he issued his proclamation, as secretary and acting governor, from Stillwater, on the 9th day of October, 1848, ordering a special election on the 30th October to fill the vacancy occasioned by the resignation of the Hon. John H. Tweedy. The authority to order this election was given to the governor of the Territory by an act of the territorial legislature, approved March 7, 1839.

Pursuant to this proclamation, an election was held at Stillwater on the day appointed, which resulted in the election of Henry H. Sibley, esq., who now claims to be the delegate from that Territory. He has presented to the House, and the House has referred to this committee, the certificate of his election under the hand of Governor Catlin, with the seal of the "Territory of Wisconsin" attached.

The question presented by this state of facts, and referred by the House to the committee, is as to the right of Mr. Sibley to his seat; and to this question the committee have directed their investigations.

There is no provision made in the Constitution of the United States for the election of delegates from any of the Territories of the United States, or for giving the right of representation to any but the States. It has, however, been the invariable practice of the government to grant to the people of the Territories this privilege, and no territorial or temporary government has been established without it. It is a custom so well established as to have assumed almost the force of law. So far, therefore, as the mere question of right is involved the committee perceive no good reason why the people of the present Territory of Wisconsin are not as much entitled to it as those of any other Territory have been or can be, unless there should be found to be something in the acts of Congress taking it from them. That it was conferred upon them, in common with the other inhabitants of the then Territory of Wisconsin, by the act organizing that Territory, is perfectly clear. Having been once conferred and enjoyed, the House of Representatives will scarcely consent to take it away, unless the enjoyment of it now shall operate against the public interest, or shall conflict with some existing provision of law. The committee can well conceive how any portion of the citizens of the United States may deprive themselves of the right of representation in Congress, by voluntarily going beyond the limits within which Congress has said that this right may be enjoyed; but they can scarcely suppose it to be possible that these limits, when once formed and fixed, would be narrowed so as to *exclude* any portion of those embraced in them.

The people of the present Territory of Wisconsin once enjoyed the right of representation in Congress. This right was conferred by act of Congress. They aided in the election of a delegate, in making laws for the whole Territory, and in the formation of a constitution for the present State of Wisconsin. They

did all this under the belief that they were thereby preparing themselves for the full enjoyment of a *State* government under the constitution of the United States. But Congress, by the act of May 29, 1848, deprived them of these advantages, and placed them beyond the limits of the State. There was, however, no attempt to take from them any of the rights to which they were entitled as citizens of the *Territory* of Wisconsin, which they unquestionably were after the admission of the *State* of Wisconsin. The act of May 29, 1848, repealed no part of the existing organic law of the Territory. That law, therefore, was left in force over all that part of the Territory not embraced within the State, unless by the mere fact of organizing the State it was abrogated and annulled. The committee do not think that such could have possibly been its effect, and they will briefly state their reasons for this conclusion.

The ordinance of July 13, 1787, "for the government of the Territory of the United States northwest of the river Ohio," secured to the citizens of that Territory, and to those who should thereafter become citizens, all the forms of civil government, the *perpetual* enjoyment of "the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law." Under this compact between the original States, and the people and States in the said Territory," which Congress declared should "forever remain unalterable, unless by common consent," it is not perceived how it is possible that any portion of the inhabitants of said Territory should be deprived of any of these rights, without their consent, after they have been once acquired. Thus, to deprive them would be to dissolve their society into its original elements, and to substitute anarchy and disorder for a government of laws. Nothing can be further than this from both the purpose and policy of our government.

The abrogation of a law is by the enactment of some other law in conflict with it. It is alone by this antagonism that it is made a nullity, unless it be so declared by positive repeal. Here then was no repeal—the act admitting Wisconsin as a State leaving the remaining inhabitants of the Territory to enjoy all their legal rights then existing. Nor is there any conflict between the State government of Wisconsin and the government of the Territory of Wisconsin. The two governments operate upon different people—people who were once the same, but who have become different by the act of creating the two governments. Each exists within a sphere wholly separate and distinct. The jurisdiction of one does not, in any degree, interfere with the jurisdiction of the other. The committee, therefore, are of opinion that the provisions of law for the organization of the original Territory of Wisconsin were left in force beyond the St. Croix river, by the act admitting the State of Wisconsin into the Union, and that the inhabitants there are entitled to all the benefits conferred by that act.

If they doubted about the law of the case, their conclusion would be the same if they were left to derive it from the intention of Congress. Looking at the several acts fixing the boundaries of Wisconsin, and that admitting the State into the Union, it will be readily concluded that Congress must have known that there were inhabitants of the Territory beyond the St. Croix river. Could it have been possible that, knowing this, a government already existing over them would have been destroyed? Congress could not so have intended, even had they the power to do so under the ordinance of 1787. The omission of Congress to take any action on the subject of a new territorial government, for the people inhabiting the residuum of the Territory, and the absence of a repealing or modifying clause in the act for the admission of the State, are conclusive proofs that t was not the intention of Congress to make the organic law inoperative in the egion not comprised within the limits of the State. And such has been the construction put upon it, as the committee learn, by the executive department

of the government. The committee have had laid before them the opinion, upon this subject, of the distinguished gentleman at the head of the State Department, and find that he concurs with that which they have expressed. Acting upon the authority of this opinion, the officers of the present Territory have regarded themselves as entitled to hold their offices under their original appointment, made before the State of Wisconsin was formed. Such has been the uniform practice of the government when similar questions have arisen. When, by the act of June 12, 1838, the Territory of Wisconsin was divided, and that of Iowa formed out of the portion lying west of the Mississippi, a judge who had resided *west* of that river removed and fixed his residence *east* of it. He continued afterwards to act as judge in the Territory of Wisconsin, to which he had removed, without further appointment or qualification, and was regarded by the President of the United States, Mr. Van Buren, as legitimately entitled to do so. These opinions of the executive department of the government show that the division of a Territory has at no time been regarded by the government as a destruction of its component parts.

The residence of the officer, before he assumes his territorial duties, does not in any way affect the question. A citizen of any State may be appointed to office in a Territory, without any previous residence there. All that the Constitution of the United States requires is that he shall be a citizen of the United States. Governor Catlin and the other officers of the Territory of Wisconsin, before the admission of the *State*, had the legal right to remove beyond the St. Croix river, and to hold their offices there as officers of the new Territory. Of this the committee do not entertain any doubt. An opposite conclusion would not only disfranchise those inhabitants beyond the St. Croix, but deprive them entirely of the benefits of the government which Congress had already provided for them. This the committee do not suppose that Congress had the power or wish to do.

Although it is not a case in all respects like the one now before the committee, yet the case of Paul Fearing, which was settled by the House of Representatives, at the 2d session of the 7th Congress, is somewhat analogous to it. That case was as follows:

Ohio was admitted into the Union as a State, by act of Congress passed May 1, 1802. On the 6th December, 1802, Paul Fearing took his seat in the House of Representatives as a delegate from the Northwestern Territory, elected before the passage of the act authorizing the admission of the State into the Union. Subsequent to this time, on the 24th January, 1803, a resolution was introduced, declaring that Mr. Fearing was not entitled to hold his seat, inasmuch as he had been elected a *delegate* by the inhabitants of the Territory of which Ohio constituted a part. This resolution was referred to the Committee of Elections, by whom a report was made in favor of Mr. Fearing's right to his seat.

The report of the committee was not brought to a final vote, but being laid on the table, Mr. Fearing retained his seat; the House thereby affirming the principle that "the erection of a Territory into a State does not necessarily vacate the seat of the delegate. Had Mr. Tweedy chosen to retain his seat as a delegate from the Territory of Wisconsin, his case would have been a parallel one with that of Mr. Fearing; and the committee suppose that the House, recognizing the principle then settled, would have permitted him to retain his seat until the close of the present Congress, as the representative of those who have elected the present claimant. The right of Mr. Sibley is precisely the same, except so far as it may involve the authority of Governor Catlin to order, and of the other officers of the present Territory to conduct the election. That they had such right, the committee have already shown.

The committee are not informed whether or no there had been an election of representatives from the *State* of Ohio at the time of the settlement of the question in Fearing's case. They apprehend, however, that if there had been, they

would have been permitted to take their seats, and that this would not have deprived Fearing of his right, inasmuch as the right had been acquired before the State was formed. The representative from the *State*, and the delegate from the *Territory*, might each have held his seat without any conflict. The principle upon which such a case rests is the impracticability of destroying the right of the people to representation after it has been conferred by act of Congress.

Besides the views thus submitted to the House, there are high considerations of policy favoring the admission of the delegate from this Territory. Within a few months the government has invited settlers to emigrate into this new region of country, by opening an office for the sale of lands. Thousands of acres have been sold, and the population is rapidly increasing. It is not, therefore, to be supposed that the government will now withdraw from them the protection of law. Indeed, the committee think that it is bound by every obligation of good faith to give them the blessings of a continued and regular government.

Entertaining these views, the committee report to the House, for its adoption, the following resolution :

Resolved, That Henry H. Sibley be admitted to a seat on the floor of the House of Representatives as a delegate from the Territory of Wisconsin.

The House on January 15, 1849, adopted the resolution reported by the committee without debate—yeas, 124, nays 62.

THIRTY-FIRST CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. STRONG, Penn.
HARRIS, of Ala.
VAN DYKE, N. J.
DISNEY, Ohio.
THOMPSON, Ky.
Mr. HARRIS, of Tenn.
McGAUGHEY, Ind.
ASH, N. C.
ANDREWS, N. Y.

HUGH N. SMITH, *of New Mexico.*

Mr. Smith presented himself as the choice of the people of New Mexico for delegate in Congress. The committee, upon the ground that no territorial government had been established over New Mexico—that the State of Texas claimed a part of this Territory—and finally that at the time of his election Mr. Smith was a citizen of Santa Fé, held that New Mexico was not entitled to a delegate in Congress, and recommended that Mr. Smith be not admitted. The House laid the whole subject on the table, and Mr. Smith was not admitted.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 4, 1850.

Mr. STRONG, from the Committee of Elections, made the following report :

The facts which are necessary to a just consideration of the case presented may be briefly stated as follows: The province or department of New Mexico is a part of that territory recently ceded to the United States by the treaty of Guadalupe Hidalgo, and before the cession was a department known to the Mexican constitution, and entitled to representation in the Mexican Congress. It had also its departmental legislature. In the Mexican federal constitution of 1824 it was recognized as one of the territories of the republic, with known boundaries, and in the subsequent Mexican constitutions of 1836 and 1843 it

was made one of the departments of the republic, and as such sent one representative to the national Congress, and was subordinately governed by its own legislature. The department was subdivided into seven districts or counties, five of them embracing territory both upon the east and west sides of the Rio Grande, and two of them being wholly upon the east side of that river. At the date of the cession, therefore, New Mexico had a complete political organization. It is not claimed, and certainly it could not justly be, that this organization continued after the cession of the territory to the United States. New Mexico was acquired, not as a political division, not as a State or a Territory, but as a part of a large tract of country, the title to the sovereignty of which, and to the unappropriated lands, was by the treaty transferred from Mexico to the United States. Upon that transfer all political laws, all governmental organizations, ceased to have any legal existence. These facts are, therefore, only stated because an argument is deduced from them in favor of the admission of the memorialist. Your committee have found difficulty in ascertaining the extent of territory and the number of inhabitants embraced within the limits of New Mexico. Before the Texan revolution, the area of the department was about two hundred thousand square miles, of which about one-third was west of the river Rio Grande, and the remaining two-thirds were upon the eastern side. The population of the whole is variously estimated at from eighty to one hundred thousand, of which more than two-thirds are residents of the eastern bank of the river. It is, however, well known that the State of Texas claims as within her limits all the territory east of the Rio Grande, and the validity or invalidity of this claim has never been definitely settled. After the cession of the territory to the United States, New Mexico, or at least part of it not embraced within the limits of Texas, was, and continues to be, without any form of civil government. Lieutenant Colonel Washington was stationed there as a military commandant, but no political organization known to our laws, and none even in fact, had any existence.

On the 21st day of August, A. D. 1849, in accordance with public notice previously given, a considerable number of the citizens of Santa Fé county (one of the counties lying wholly on the east bank of the Rio Grande) assembled in the city of Santa Fé, to consult upon the propriety of organizing a suitable territorial government. At this meeting various resolutions were adopted expressive of their sense of the evils resulting from a continuance of the half-civil and half-military government under which they were then living. A resolution was also adopted requesting Lieutenant Colonel B. L. Beall, then the acting military commandant at Santa Fé, in the absence of Colonel Washington, to recommend to the citizens of the several counties of New Mexico to assemble in mass meetings, and elect delegates to a general convention to be held in the city of Santa Fé on the 24th day of September then next ensuing, "to concert such plans and adopt such measures as might be most effectual for the attainment of good civil government. In compliance with this request, Lieutenant Colonel Beall issued a proclamation to the citizens of New Mexico, recommending to them to assemble in mass meetings, in the different counties, and at designated places, on the 10th day of September, A. D. 1849, for the purpose of electing delegates to a general convention to convene in Santa Fé on the 24th day of September then next ensuing. It was also recommended that the rate of representation be "regulated by the organic laws of the Territory adopted by General Kearny." The proclamation stated the object of the convention to be "the concert of such plans and the adoption of such measures as might be most effectual to the attainment of a good civil government, and the appointment of a delegate to go to Washington to enforce its suggestions and projects, and to urge the early action of Congress in its behalf." In conformity with the recommendations of this proclamation, elections were held, and the delegates elected met in convention at Santa Fé on the 24th day of September, A. D.

1849, nineteen in number, and organized by the election of Rev. Cuva. Antonio José Martinez as their president, and James H. Quinn as their secretary. On the same day the convention proceeded to the election of a delegate to represent the interests of the Territory in the Congress of the United States, and elected Hugh N. Smith, esq., the memorialist, to be their delegate. The convention then proceeded to prepare a plan, to be submitted to Congress, as the basis upon which they desired the civil government of the Territory of New Mexico to be formed, and instructed their delegate to urge upon Congress to give to the country a territorial government embracing the provisions contained in the plan by them recommended. Thus selected and instructed, Mr. Smith asks to be admitted to a seat in the House of Representatives, on the same footing with the delegates from the Territories heretofore organized under the laws of the United States. He presents, as his credentials, a certificate, of which the following is a copy, signed by Antonio José Martinez, the president of the convention, and attested by its secretary:

"Be it remembered, that in the convention of delegates chosen from the seven different counties of New Mexico to assemble in the city of Santa Fé on the 24th day of September, A. D. 1849, for the purpose of forming and proposing the basis of a government which the people of New Mexico desire should be granted to them by the Congress of the United States, and for the purpose of choosing a delegate to represent New Mexico in the House of Representatives of the thirty-first Congress of the United States, Hugh N. Smith was chosen by a majority of all the convention, and declared duly elected said delegate.

"Given under our hands, at Santa Fé, this twenty-sixth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

"ANTONIO JOSÉ MARTINEZ,
"*Presidente de la Convencione.*

"JAMES H. QUINN, *Secretary.*"

Mr. Smith was at the time of his election a citizen of Santa Fé county, and of the city of Santa Fé. There are no other facts which, in the estimation of your committee, should affect the decision of the question which has been referred to them. The difficulties and embarrassments under which the people of New Mexico suffer for the want of some civil government, though doubtless real, cannot be considered in examining the application of the memorialist. They would neither be mitigated nor increased by the consent or refusal of the House to admit Mr. Smith to a seat. Nor is it the province of this committee to inquire into the necessity of establishing any form of government for New Mexico.

The admission of Mr. Smith to the seat which he claims would be a violation of all precedent—a departure from all the established usages of the House. The House of Representatives is now, and ever has been, composed of members elected under the Constitution and laws of the United States, and in accordance with the provisions of that Constitution and those laws. No person elected in any other way, sent by any other authority, has ever been admitted to a seat in the House. The usages of the House have been uniform and unbroken. Territorial delegates have been admitted to seats in this body, with the privilege of debating, though not of voting, ever since the adoption of the Constitution. Indeed, this usage is older than the Constitution itself. Under the old Confederation, by the ordinance of July 13, A. D. 1787, providing for the government of the Territory northwest of the Ohio, permission was given to the legislature of the Territory to elect by joint ballot a delegate to Congress, who should have a seat in the House of Representatives, with the privilege of debating, though not of voting, during the existence of the territorial government. That ordinance was reaffirmed by an act of the first Congress assembled under the present Constitution, and the delegate was thus permitted to hold his seat. In accordance with this precedent, as other territorial governments have been formed and become entitled under their fundamental law to territorial legislatures, Congress has uniformly provided for the admission to a seat in the House

of Representatives of a delegate from each. But in every case the delegate has been chosen under laws enacted by Congress, and from a government subordinate to and emanating from the Constitution and laws of the United States. Other political organizations have existed in portions of the unorganized territories of the United States; but it is believed that none such have claimed, certainly none have been permitted, to enjoy representation here. The case of the Hon. H. H. Sibley, who was admitted as a delegate from the Territory of Wisconsin, is no departure from this usage. Both his election and his admission were based upon the position that the territorial government of Wisconsin was not merged in the State government afterwards formed, but that it continued to have a legal existence over that territory not embraced within the limits of the State after the admission of the State into the Union. The memorialist, however, does not rest his claim upon the Constitution and laws of the United States. He asks to be permitted to represent New Mexico. But, as a government, New Mexico is as much unknown to our laws as is the Great Salt Lake valley, or the territory west of Minnesota. It has already been shown that the political organization which existed while it constituted a part of the republic of Mexico ceased to have any existence when the territory was ceded to the United States by the treaty of Guadalupe Hidalgo. There is now no such Territory, no such government as New Mexico having a legal being. It is conceded that Congress might adopt as its own the organization formerly existing there, and by law recognize the local government which the country enjoyed before the treaty of cession. Upon such recognition, it would become a government under the Constitution and laws of the United States; but even then, unless provision were made for the election of a delegate to Congress, none could be admitted without violation of usage, for no delegate has even been admitted except in cases where privilege has been antecedently granted to elect one, and where the mode of his election has been previously prescribed.

It may also be asserted that such a recognition of New Mexico as an existing government can only be made by law, and is not within the constitutional power of the House of Representatives alone. Yet the admission of Mr. Smith to the seat which he claims would be a *quasi* recognition of New Mexico as an organized government. He claims a seat as a delegate from such a government, and, if admitted, will be admitted as such; for it cannot be asserted that he claims in any other character than as the representative of a Territory. The conclusion cannot be avoided that this house by yielding to him the seat which he asks would recognize the legal existence of New Mexico as an organized government, and impliedly, though indirectly, adopt the political organization which existed before the treaty of cession. It need not be said that such a ratification is not within the constitutional powers of the House of Representatives alone. Until, therefore, Congress shall adopt as its own the government formerly existing in that portion of our territory, your committee are of opinion that no act should be done by the House of Representatives which even by implication may give force and vitality to a political organization formerly existing, but extinguished by the treaty of cession, and unknown to the laws of the United States. It may also be observed that the convention which elected the memorialist did not ask for a recognition of the civil government formerly existing there. On the contrary, their request is that a *new* territorial government may be formed, constituted upon the basis which they have submitted—a basis which denies the existence of any present governmental organization.

If it be suggested that the memorialist may be received, not in the character of a delegate from New Mexico, as a government or political organization, but as a representative of the inhabitants residing in a portion of the unorganized country belonging to the United States, it may be answered that the facts already stated show that he was elected to act for the Territory of New Mexico as such, including both sides of the Rio Grande. And if such were not the

fact—if he may be regarded as simply the representative of the convention which elected him, or of the constituency of the convention—his admission to a seat in the House would, in the opinion of your committee, be both anomalous and unwise; it would be a change of the character of representation in Congress. It is presumed that the House is not prepared to concede that the inhabitants of any part of the unorganized lands of the United States may enjoy representation here. To establish such a precedent would be holding forth inducements extending an invitation for many similar applications. Upon the same principle might a public meeting in Georgetown or in the city of Washington send a delegate here and ask that a seat in the House of Representatives be accorded to him. With equal propriety might the settlers upon any part of the public lands extending from Minnesota to the Rocky mountains claim representation here. We have a vast extent of territory, over which we have as yet erected no form of government, and many years must elapse before territorial governments can be created over all that country. Emigration to these vacant lands must necessarily precede the formation of civil governments. Bodies of settlers will be found on the different rivers and prairies, at different distances from one another, each having interests peculiar to itself. It surely cannot be supposed good policy to establish now a principle which shall give to each of these communities a delegate to the House of Representatives.

There is another view of the question presented to your committee, which, in their opinion, is of controlling influence, and confirms them in the conclusion to which they have arrived. It has already been stated that two-thirds of the territory which was New Mexico, and more that two thirds of the population resident within it, are upon the eastern bank of the Rio Grande, and that the memorialist himself is a citizen of one of the counties situated wholly upon the eastern side of that river. It has also been stated that the whole of that country is claimed by the State of Texas as being embraced within her limits, and, it may be added, has been so claimed ever since the adoption of her constitution, on the 17th of March, A. D. 1836. It is not within the province of your committee to determine whether that claim is just or is rightfully made, nor do they intend to express any opinion upon that subject. For the purposes of this discussion it is enough that the claim is made, and that is has never been authoritatively decided to be invalid. If, according to this claim, the disputed territory be a part of the State of Texas, no argument is necessary to show the utter inadmissibility of the claim of the memorialist. If admitted to the seat which he asks, he would represent a district and a people already represented under the constitution. In that case his admission would be as impolitic and improper as it would be to permit the people of any district in Pennsylvania to send a delegate to Congress in addition to the representation secured to them by the Constitution and laws of the United States. Indeed, if the claims of Texas be well founded, the proposition to receive a delegate elected, as was Mr. Smith, from a part of the State, and principally by inhabitants of the State, is too absurd to merit discussion. If, on the other hand, the claims which Texas advances are not founded in justice, still they are *existing* claims, and it is undeniably not competent for the House of Representatives alone to determine their invalidity. In the present condition of her asserted rights, Texas might with reason complain of any action by the House either directly or inferentially denying their validity. It must, however, be apparent that the election of Mr. Smith, the memorialist, as a delegate from New Mexico, by the inhabitants residing upon both sides of the Rio Grande, and principally by residents within the asserted limits of Texas, is an act done in denial of the sovereignty of that State over the country which she claims and in direct hostility to it. To admit such a delegate would be to sanction that denial, and to make the House of Representatives a party to that hostility. In every

aspect of this case, therefore, which has presented itself to your committee, they are of opinion that the privilege asked by the memorialist should be refused.

They submit the following resolution:

Resolved, That it is inexpedient to admit Hugh N. Smith, esq., to a seat in this house as a delegate from New Mexico.

APRIL 22, 1850.

Mr. VAN DYKE, from the Committee of Elections, made the following report:

The undersigned know of no difference of opinion among the members of the committee as to the facts in this case. They are supposed to be correctly stated by the majority of the committee in their report. What is the proper course to pursue, in view of those facts, is the question which has divided the committee, and upon which the undersigned dissent from the majority.

Two questions seem to claim the special attention of the committee and of the House: first, what should be done with this application if Texas made no claim whatever to any part of the Territory in question? and, secondly, how far the claim of Texas should be allowed to destroy the right of representation in New Mexico, if she would otherwise be entitled to it?

The privilege of the citizens of a Territory or portion of this Union not organized into a State to have a delegate on the floor of the House, with the right of debate, depends on no constitutional provision, nor even on a law of Congress, but on the pleasure of the House alone: its will is the law of the case. It is true that delegates usually come from Territories which have been organized by previous acts of Congress; but it by no means follows that no others can be admitted, if the circumstances of the case require it. States are usually admitted into the Union after provision has been made by law for their admission; but States have repeatedly been admitted without any such previous acts of Congress. Precedents have been established both ways, and for the very plain reason that the admission of States by Congress, and the admission of delegates by the House, are always questions addressed to the sound discretion of the two bodies—each application depending much more upon its own circumstances and merits than upon any settled rule or law on the subject. The present application is believed to be one addressed to the wise discretion of the House; and, as it has no precedent precisely like it, the undersigned have no hesitation in saying that, if it be clearly right in itself, and have principle to sustain it, a precedent should be made for its accommodation, to be followed hereafter in cases only where circumstances of like urgency demand the exercise of a like discretion. The right of representation on the part of all citizens of this Union, who reside within its limits and acknowledge its authorities, is a prominent feature in our institutions. Exceptions to this rule there will be, of course, where a comparatively small number of people may inhabit some wild corner of the country; and in all such cases the sound discretion of the House must determine the matter. But whenever the House shall be called upon to exercise this discretion, if there be danger of error either way, it is far wiser and safer to err in favor of representation than against it. Applying these principles to the case before the committee, and excluding, for the present, entirely the claim of Texas to a part of the Territory in question, the undersigned believe that such discretion should now be exercised in favor of New Mexico, and that the delegate which she has sent to us, elected in a manner the most authoritative and solemn which she could exert, should be admitted to a seat on the floor of the House on the same footing with other delegates. The right of these delegates to debate, though not limited to particular subjects, it is presumed will not be exercised except in matters where their immediate constituents are directly concerned. And this seems to be eminently right and just in itself, and

especially when Congress has under consideration the giving of fundamental law to such Territories. Why should they not be heard on so important a subject, if they desire it? Is it not enough that we subject them to laws of vital importance to them which they have no vote in making; but shall we also silence their wishes on the subject, when they desire to make them known to us?

The reasons for exercising this discretion in favor of New Mexico are, that she is not formed from a sudden irruption of persons "from parts unknown," and who have voluntarily placed themselves out of the jurisdiction of law, but is in fact one of the oldest settlements on the continent. She has, and long has had, at least one hundred thousand inhabitants, most of whom were born upon her soil. She was once an independent state of herself—so far as a state of Mexico could be independent—having known boundaries that had long been recognized. She had her own local or state legislature, like the States of this Union; was divided into counties, and had her representatives in the Mexican congress; and while in the enjoyment of all these rights and privileges as citizens of a regular department of the Mexican republic—a nation recognized by us as being of the highest grade—without any act of hers, and against her consent, she was suddenly transferred to this country, where her people, it seems, are to be treated as mere "outside barbarians," entitled to little, if any, more respect than the veriest savages that kill and plunder on the outskirts of the Union, with a sort of military government established over her, with no settled laws for her guidance, and with no tribunals to enforce the rights or to prohibit or punish the wrongs of her people. From her outside position, she complains of her condition, and asks our protection. This we have thus far refused; and now, when she prays that her voice may be heard, through her own representative, in the councils of the nation, even this is denied her.

It is not insisted that the former position and rights of New Mexico in the Mexican republic entitle her, as a matter of course, to the same position and rights in this country; but it is insisted that her ag, the number of her inhabitants, the settled character of her people, and the rights and position which she held in Mexico, furnish strong evidence to prove her capacity for self-government—strong reasons why we should not keep her in a worse situation than she was in before—and powerful inducements to control the discretion of the House in her favor in making her an exception to the previous practice, and in establishing a precedent on her account, if there be none established already. The undersigned are therefore of opinion that, under all the circumstances of the case, the delegate from New Mexico should be admitted to a seat in the House of Representatives, unless there be something in the claim made to a part of that country by Texas which should prevent it.

Is there, then, anything in the nature of that claim which should bar the claim of New Mexico to a delegate? It might be a sufficient answer to this objection to say that, even if the claim of Texas were admitted to its fullest extent, there still remains a considerable portion of New Mexico not claimed by Texas which claims Mr. Smith as its delegate; and that claim cannot be invalidated, even though Mr. Smith himself resides on the soil of Texas, and though a portion of the votes by which he was elected came from the same place. Such an objection can only be raised by the unclaimed portion of New Mexico; but, as she does not raise it, no one else can. And even admitting the claim of Texas, Mr. Smith may still be the delegate for New Mexico, wherever her boundaries may turn out to be. But if this were not so, the undersigned do not think that the claim of Texas to a portion of New Mexico is of such a nature, all other things being right, as to bar the admission of a delegate from that country, even though he claims to represent the whole of it.

The majority of the committee think we should not in this way pass upon this claim of Texas, one way or the other, and such is the opinion of the

minority; but if we decline to act in this matter at all, in consequence of the claim of Texas, do we not by such refusal, to some extent at least, acknowledge the force of that claim, and thereby do in part the very thing which we profess to avoid? If Texas have a *right*, as well as a *claim*, to a portion of New Mexico, let her establish that right in any manner which the law affords; but shall New Mexico in the mean time remain utterly neglected because Texas says she has a claim to her, or a part of her? That claim may be good; but we have no evidence of it whatever, except that she has asserted it on paper. She has certainly never had possession of a foot of the Territory, nor in any manner exercised jurisdiction over it; nor has her right thereto ever been admitted or acknowledged by any authority in the world, except by herself: on the contrary, her claim was always resisted by the Mexican government, by New Mexico herself, and by this government also, down to the present hour, by both the late and the present administrations. The claim of Texas to the Rio Grande below the Paso was maintained by the late administration; but above that point both Mr. Buchanan and President Polk maintained a directly different position, and one entirely adverse to the claim of Texas.

Mr. Buchanan, in his instructions to Mr. Slidell, the minister to Mexico, of the date of the 10th November, 1845, uses the following language on the subject of the Texas claim, viz:

> In regard to the right of Texas to the boundary of the Del Norte, from its mouth to the Paso, there cannot, it is apprehended, be any very serious doubt. * * * * *
>
> The case is different in regard to New Mexico. Santa Fé, its capital, was settled by the Spaniards more than two centuries ago; and that province has been ever since in their possession and that of the republic of Mexico. The Texans never have conquered or taken possession of it, nor have its people ever been represented in any of their legislative assemblies or conventions.

Mr. Polk, in his message of the 24th July, 1848, in reply to a resolution of the House making inquiry in regard to the civil governments established in New Mexico, among other things, says:

> Though the republic of Texas, by many acts of sovereignty which she asserted and exercised, some of which were stated in my annual message of December, 1846, had established her clear title to the country west of the Nueces and bordering upon that part of the Rio Grande which lies below the province of New Mexico, she had never conquered or reduced to actual possession, and brought under her government and laws, that part of New Mexico lying east of the Rio Grande, which she claimed to be within her limits. On the breaking out of the war we found Mexico in possession of this disputed territory. As our army approached Santa Fé, it was found to be held by a governor under Mexican authority, with an armed force collected to resist our advance. The inhabitants were Mexicans, acknowledging allegiance to Mexico.

And under this view of the case, the late administration, as well as the present, held the whole of New Mexico under their control, in defiance of the claim of Texas; and yet it is insisted that the House of Representatives should do nothing which may seem adverse to such claim, while the government itself has, since the commencement of the war, been acting adversely to it. But the truth is, that the right of Texas can never be decided or affected by any side proceedings, such as holding New Mexico under military control, or allowing to her a delegate in Congress. The question must be settled, if ever, when directly raised, and in that way only. But, in the mean time, while New Mexico is under no subjection to Texas, while she receives no protection from her, and has no interest or participation in her affairs, but, on the contrary, denies her authority, dislikes the connexion, and strenuously opposes becoming a part of her, and while her people go by themselves, think by themselves, and act by themselves, independently of Texas—the undersigned think that while New Mexico remains in this state—and how long this will last no one can tell—she should be treated as a separate community or Territory, and have not only such a government as she desires, but also a representative of her own on the floor of Congress. The undersigned therefore recommend the adoption of the following resolution, viz:

Resolved, That the said Hugh N. Smith be admitted to a seat in the House of Representatives of the United States as a delegate from New Mexico.

JOHN VAN DYKE.
E. W. McGAUGHEY.
G. R. ANDREWS.

The debate in the House was lengthy, and the subjoined brief extracts will indicate its character. Mr. STRONG said:

* * * * The question is not, therefore, whether a government should be given to them upon the basis which they themselves recommended; it is not whether any other form of government shall be given to them; it is not whether they are suffering from want of government; but the question is, whether, under such circumstances, Mr. Smith, presenting such credentials, shall be admitted upon the floor on an equal footing with the delegates from the organized Territories of the United States.

Sir, a majority of the committee came to the conclusion that Mr. Smith should not thus be admitted, and they have submitted to the House and to this committee their views in regard to this application. They have submitted several reasons which, to my mind, have not been answered by anything that has been advanced by the minority of the committee, or by anything that we have heard from any other quarter.

The majority of the committee regarded this application as a departure from all precedent—from all the former usages of the government.

Mr. Chairman, our Constitution has been in existence for a period of more than sixty years. During that time we have had sitting on this floor a large number of delegates, who have come in as consulting members from different Territories, and they have all come in on one principle. There has been no exception to the usage of the House in regard to this matter. No person has ever been admitted to sit upon the floor of this house as delegate, except his right has been secured by the Constitution to sit here as a potential member of the House, or unless his privilege to sit as a consulting member has been granted by antecedent law.

Mr. CARTTER addressed the committee in support of the claim of New Mexico to a delegate upon the floor of the House; and, in the course of his remarks, argued that all which had been urged against the reception of the delegate, by reason of the disputed condition of the boundary between New Mexico and Texas, ought to have no force, because it was not involved in the reception of the delegate. That the House was not trying the question of boundary, but in determining whether they would hear one of the parties, and that party now excluded, by receiving their accredited delegate; that the objection which had been urged, that the delegate should not be received because government has not organized a Territory to be represented, was avoided in the fact that the department of New Mexico came to us already organized into a civil state, in which condition it had existed under Mexico, long before Texas had existence. The treaty with Mexico transferred its relations from Mexico to the United States; by the same treaty our government assumed the obligation of not only listening to her own representations of her civil wants, but of providing for them. That those who had urged that there was no precedent for the admission of her delegate deceived themselves; that the reception of all delegates constituted precedents for this case; a delegate from any Territory is not an officer provided for by the Constitution, and when admitted to the floor of the House discharges no constitutional duties; his right to vote does not exist; the ceremonies connected with his coming are unimportant. The main subject of inquiry is, what people and district does he represent, and is it important to the interests of the Union that it should be represented? The fact that has been urged, that her delegate should not be received because New Mexico had organized into a State, unconstitutionally and irregularly, is foreign to the question before the House, and ought not to influence its decision. We are not trying her right to admission as a State. He urged further, that the question of the reception of the delegate was unembarrassed in his mind by any constitutional objection whatever. That the whole question for the House to consider was, whether the interests of New Mexico required a voice upon the floor of the House. That if the interests of Minnesota, or Oregon, required representation, New Mexico did. Her population was far greater than either, and their condition more exposed to invasion, outrage, and threatened by a neighboring State with annihilation. That not only every department of her business was suffering, but her very existence threatened. That, without assuming any judgment as to her rights in dispute with Texas, he was disposed to hear her before executing judgment upon her.

On July 18, 1850, the whole subject was disposed of by laying it on the table—ayes, 103; nays, 93. Mr. Smith, therefore, was not admitted as delegate from New Mexico.

NOTE.—The debate in this case will be found in vol. 21, part 2, from pages 1038 to 1411.

THIRTY-FIRST CONGRESS, FIRST SESSION.

A. W. BABBITT, *of Deseret.*

Where there was no authorized territorial organization, the committee held that no delegate should be admitted to Congress.

The House laid the subject upon the table, which practically excluded Mr. Babbitt.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 4, 1850.

Mr. STRONG, from the Committee of Elections, made the following report:

The facts upon which this application is founded, so far as they have been ascertained by your committee, are these: Prior to the first day of February, A. D. 1849, a considerable population had located themselves in the district of Upper California, in that portion of it lying east of the Sierra Nevada mountains, and principally in the valley of the Great Salt Lake. How numerous those settlers were, your committee have had no means of ascertaining; nor, in the view which they have taken of the application of the memorialist, is the number at all material. It is supposed they may have amounted to from twenty to thirty thousand.

On the 1st day of February, A. D. 1849, at the Great Salt Lake city, a notice was published, bearing the signature "Many Citizens," a copy of which is appended to this report, marked A. The notice purported to inform all citizens of that part of Upper California lying east of the Sierra Nevada mountains that a convention would be held at the Great Salt Lake city, on the 5th of March then next ensuing, for the purpose of taking into consideration the propriety of organizing a territorial or State government. How great publicity was given to this notice is unknown to your committee. It appears, however, that on the 5th day of March, A. D. 1849, some portion of the inhabitants of the Great Salt Lake valley assembled, formed themselves into a convention, and proceeded to construct a constitution for a free and independent government, to be called the "State of Deseret." Provision was made that this constitution should continue in force until the Congress of the United States should otherwise provide for the government of the Territory therein described. The boundaries of the "State of Deseret," as limited in its constitution, embraced not only all that part of Upper California which is east of the Sierra Nevada mountains, but extended west of those mountains to the Pacific ocean, and embraced about four hundred thousand square miles, including a small part of Oregon. The legislature, for the election of which the constitution made provision, assembled on the 2d day of July, A. D. 1849, and organized as a legislative body. The presiding officer announced that a majority of votes had been given for the adoption of the constitution. It was then resolved that the general assembly of the State should elect a delegate to the Congress of the United States, to present a memorial for a State or territorial government, and to represent the interests of the State of Deseret in Congress. In pursuance of that resolution, the senate and house, on the 5th day of July, A. D. 1849, in joint session, elected Almon W. Babbitt, esq., the memorialist, their delegate and representative to Congress. A copy of the constitution and of the journal of the convention and the legislature is hereunto appended, and marked B. Mr. Babbitt presents a certificate, of which the following is a copy, and upon it, and the facts above stated, bases his application for a seat in the House of Representatives:

PROVISIONAL STATE OF DESERET, *ss:*

I hereby certify that, pursuant to a joint resolution passed by both houses of the general assembly of this State, Almon W. Babbitt, esq., was on the 5th day of July, one thousand eight hundred and forty-nine, elected by both branches of the general assembly a delegate to the Congress of the United States, to present the memorial of said general assembly, and otherwise represent the interests of the inhabitants of this State in Congress.

Given under my hand and the great seal of the State of Deseret, at the city of the Great Salt Lake, this twenty-fifth day of July, eighteen hundred and forty-nine.

[SEAL.] WILLARD RICHARDS,
Secretary of State.

The above, it is believed, are all the facts which are material for a correct understanding of the case. Your committee are unable to discover any sound reason for the admission of Mr. Babbitt to the seat which he claims. This house is now, and ever has been, composed of members elected under the Constitution and laws of the United States, and by virtue of the provisions of that Constitution and those laws. But the present application rests, not upon the Constitution and laws of the United States, but upon the constitution and laws of a government unknown to both, extra-constitutional and independent. The memorialist comes as the representative of a State, but of a State not in the Union, and therefore not entitled to representation here. It is true that he does not claim a seat as a right, but as a courtesy—not as the constitutional representative of a State, but as a delegate sent from a political organization to this body. Such a courtesy never has been extended in the past, and your committee do not perceive why there should in this case be a departure from the established usages of the government. Territorial delegates have been admitted to seats in this body, with the privilege of debating, though not of voting, ever since the adoption of the Constitution. Indeed, under the old confederation, by the ordinance of July 13, 1787, for the government of the Territory northwest of the Ohio, it was provided that the legislature of the Territory should have authority to elect, by joint ballot, a delegate to Congress, who should have a seat in the House of Representatives, with a right of debating, but not of voting, during the temporary government. That ordinance was recognized by an act of the first Congress assembled under the present Constitution, and the delegate from that Territory continued to hold his seat. In accordance with this precedent, as other territorial governments were formed, and became entitled, under their fundamental law, to territorial legislatures, Congress has uniformly provided for the admission to a seat in this body of a delegate from each. But in every case the delegate has been chosen under laws enacted by Congress, and from a government subordinate to, and emanating from, the Constitution and laws of the United States. Other political organizations have existed in portions of the unorganized territory of the United States; but it is believed that none such have claimed—certainly none have been permitted to enjoy—representation here.

Your committee would also submit another reason for the conclusion to which they have arrived. The admission of Mr. Babbitt to the seat which he asks would be a *quasi* recognition of the legal existence of the "State of Deseret." He claims his seat as a delegate from such a State, relies upon credentials furnished by such a State, and, if admitted, will be admitted from that State. The conclusion is irresistible that this house, by yielding to him the seat which he asks, would recognize the existence of the asserted government of the "State of Deseret," and impliedly, though indirectly, ratify what has been done in the formation of a constitution. Such a ratification is not within the constitutional powers of this house alone. So long, therefore, as Congress neglects or refuses to adopt as its act what has been done by the people of the Great Salt Lake valley, your committee are of opinion that no act should be done by this house which, even by implication, may give force and vitality to a political organization extra-constitutional and independent of the laws of the United States.

There is also another view of the case which, in the opinion of your committee, is entitled to controlling influence in the decision of the question submitted to their consideration. It has already been stated that the legislative assembly of the "State of Deseret," on the second day of July, A. D. 1849, adopted a resolution to elect a "delegate to the Congress of the United States to present a memorial for a State or territorial government, and to represent the interests of said State in Congress." It was in pursuance of this resolution that Mr. Babbitt was elected; and the same body which elected him draughted a memorial and forwarded it by him for presentation here. In that memorial the legislative assembly of the "State of Deseret," after praying for the admission of the State into the Union on an equal footing with the other States, or for the establishment of some other form of civil government, ask that, "*upon the adoption of any form of government*, their delegate may be received, and their interests be properly and faithfully represented in the Congress of the United States." It is thus apparent that those by whom Mr. Babbitt was sent do not contemplate his admission to a seat in this house until some form of government shall have been given to them by Congress.

Your committee therefore recommend the adoption of the following resolution:

Resolved, That it is inexpedient to admit Almon W. Babbitt, Esq., to a seat in this body as a delegate from the alleged State of Deseret.

The debate (which was brief) upon this case was confined principally to the question of expediency. The House laid the whole subject on the table, (July 20, 1850.) Yeas, 104; nays, 78.

NOTE.—The debate upon the case, which, as is stated above, was upon the *expediency* of admitting a delegate from Deseret, will be found in vol. 21, part 2, pages 1413, 1414, 1415, 1419, 1420, 1421, 1422, and 1423.

THIRTY-FIRST CONGRESS, FIRST SESSION.

MILLER *vs.* THOMPSON, *of Iowa.*

To constitute residence within the constitutional meaning of the term there must be the "intention to remain," but this intention is entirely consistent with a purpose to change the place of abode at some future and *indefinite* day.

If the constitution and laws of a State require that electors shall vote *only* in the counties in which they reside and at designated places in those counties, votes given at other than the designated places must be treated as nullities.

The report of the committee was overruled by the House.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 18, 1850.

Mr. STRONG, from the Committee of Elections, made the following report:

The official return of the votes polled in said district for a member of the House of Representatives of the 31st Congress, at the general election held on the 7th day of August, A. D. 1848, is as follows:

For William Thompson	6,477
For Daniel F. Miller	6,091
Official majority for William Thompson	386

This official return is alleged by the contestant to be erroneous in three several particulars. He alleges—

1. That in Monroe, one of the counties embraced in the said congressional district, the clerk of the board of commissioners of said county, who was also by law a member of the board of canvassers, suppressed the vote of Kanesville, a precinct of the county, and certified a false return of the votes given; that the vote of Kanesville, thus suppressed, was: for Daniel F. Miller 493, and for William Thompson 30; and that these votes should be added to the number officially returned.

2. He alleges that the board of canvassers of Polk county, also one of the counties composing the district, counted and certified forty-two votes for William Thompson and six for the contestant, which were cast in Boone township, of said county. These votes the contestant claims should be deducted from the aggregates of the official return, because, as he alleges, Boone township was placed by the districting act in the second congressional district.

3. The contestant claims to be allowed seven additional votes in Marion county, which is also within the first district. These votes were given for Daniel Miller, and were rejected by the canvassers on account of the omission of the initial of the middle name, though the Christian and surnames were correctly described.

Upon the other side, the sitting member claims—

1. That there should be allowed and counted the votes in White Oak township, Mahaska county, (another of the counties within said district,) which were rejected by the canvassers on the ground that the judges of the election in that township did not certify that they had been sworn, according to the requisition of the statutes of Iowa, although, in truth, such oath had been administered. The votes polled in said White Oak township were: 53 for William Thompson, and 16 for Daniel F. Miller.

2. The sitting member also claims that there should be added to the official return the votes given in Chariton township, Appanoose county, (also within the district,) rejected by the canvassers for the same reasons for which the votes of White Oak township were rejected; whereas, in truth, the officers of the election in Chariton were sworn. The vote of Chariton township was: for William Thompson 16, and for Daniel F. Miller none.

3. The sitting member claims that there should be added to the official return the vote of Wells township, in Appanoose county, also rejected by the board of canvassers, for reasons similar to those assigned in the case of Chariton township. The votes in Wells were: for William Thompson 11, and for Daniel F. Miller 3.

4. The sitting member also alleges that, in the township of Boone, in Dallas county, (which is one of the counties embraced within the congressional district,) 56 votes were illegally received and counted for the contestant, under the following circumstances: The persons who thus voted were not qualified voters, under the constitution and laws of the State, in Dallas county. They were at the time non-residents of the county, and came, on the day next preceding the election, to the place at which it was held, from without the bounds of the county of Dallas, and from without the bounds of any district of country attached to Dallas for election purposes. These fifty-six votes, it is claimed by the sitting member, should be deducted from the number returned as having been given to the contestant.

The sitting member also assigns several reasons why the votes given at Kanesville should not be allowed and counted in ascertaining the result of the election. They are these:

1. That the persons who voted at Kanesville were unnaturalized aliens.

2. That they were non-residents of the State of Iowa, temporarily sojourning there, but having no domicile in the State.

3. That they had not resided six months in the State, nor twenty days within the county in which they claimed to vote, as the laws of the State required, to entitle them to the elective franchise.

4. That they were minors.

5. That the election at Kanesville was not conducted in accordance with the provisions of the statutes of Iowa.

6. That under the laws of the State there was no legally authorized district which warranted the reception of any votes at Kanesville.

7. That neither Kanesville nor the country in which those resided who voted at Kanesville was any part of Monroe county, or attached to it for election purposes, but was a part of another county, and at least six miles north of Monroe or any district of country attached thereto.

Your committee have thus stated in detail the allegations made by the parties, that the House may with less difficulty comprehend the application of the testimony submitted. Most of these allegations may be briefly dismissed.

The third averment of the contestant is satisfactorily proved, and the committee are unanimously of opinion that the seven rejected votes in Marion should be counted for him.

The committee are also of opinion that the votes in White Oak township, in Chariton township, and in Wells township, (described in the first, second, and third averments of the sitting member,) should be received and counted—his allegations in respect to them having been proved by the evidence submitted.

There remain but three questions for consideration, each of which will be examined in order:

1. Should the vote at Kanesville be received and counted?

2. Should the vote of Boone township, Polk county, be rejected?

3. Should the return of the votes of Boone township, Dallas county, be purged of the fifty-six votes alleged by the sitting member to have been illegally received there?

The committee dismiss the consideration of the 1st, 2d, 3d, 4th, and 5th objections urged by the sitting member against the allowance of the Kanesville vote, with the single remark that they are not sustained by the evidence which has been presented. The qualifications of voters in the State of Iowa, as defined in her constitution, are six months' residence in the State of any white male citizen of the United States, and twenty days' residence in the county in which the vote is claimed, next preceding the election. It is doubtless true, that, to constitute residence within the constitutional meaning of the term, there must be the "intention to remain;" but this intention is entirely consistent with a purpose to change the place of abode at some future and *indefinite* day. Actual abode is "*prima facie*" residence; and we are unable to perceive anything in the evidence submitted which removes the presumption of qualification arising from the actual abode of the Kanesville voters within the State.

More grave and important are the questions, whether those persons who voted at Kanesville had any right to vote *at that place;* whether Kanesville was a place at which votes could legally be received; whether the commissioners of Monroe county had any such authority as they exercised to lay out a township and appoint a place of holding an election there; or, in other words, whether the residents of Kanesville and its vicinity could vote at any other place than in the county to which they had been attached by law.

By the Constitution of the United States, the *times, places,* and *manner* of holding elections, and the *qualifications of voters,* are left to the control of the States. The elective franchise is a political, not a natural right, and can only be exercised in the *way,* at *the time,* and *at the place* which may be designated by law. If by the constitution and laws of Iowa, therefore, it was required that electors should vote *only* in the counties in which they resided, and at designated places within those counties, it cannot be doubted that votes given in other coun-

ties, or at other than the designated places, must be treated as nullities. To deny this, is to deny to the State the power expressly reserved in the Constitution to prescribe the place and manner of holding the elections—a power essential to the preservation of the purity of elections. Assuming, then, that those who voted at Kanesville were qualified voters, it remains to be considered whether they voted at the place prescribed by law.

We submit a brief statement of the facts, as they appear in evidence: Monroe county, the county in which the vote is alleged to have been but partially returned, is situated about midway between the eastern and western boundaries of the State. Kanesville, the alleged rejected precinct, lies about four miles from the Missouri river, which is the western boundary of the State, and about one hundred and fifty miles from any part of Monroe county proper. Prior to and up to August, 1848, the greater portion of the western half of Iowa had never been organized into counties. The elective franchise was, however, secured to the residents of that territory, both by the constitution of the State and by a legislative act passed July 28, 1840. By various statutes the country was attached to the organized counties lying directly east, for revenue, judicial, and election purposes. On the 11th of June, A. D. 1845, an act was passed providing for the organization of Kishkekosh (now Monroe) county. This was one among a number of frontier counties bounded on the west by the unorganized territory of the State. By the 17th section of the act it was enacted "that the territory west of said county be, and the same hereby is, attached to the county of Kishkekosh, (now Monroe,) for election, revenue, and judicial purposes." The northern line of Monroe county is the line dividing United States townships 73 and 74 north; and it adjoins Mahaska county, the southern boundary of which is the northern line of Monroe. On the 5th of February, A. D. 1844, the country west of Mahaska county was attached to it, for election, judicial, and revenue purposes, by an act of the legislature. The northern boundary of Mahaska is the line dividing townships 77 and 78 north, which is also the southern boundary of Dallas county. On the 16th of February, 1847, an act of the legislature attached to Dallas county, for election and other purposes, the country west of it. Thus it appears that only the country *directly* west of each of these counties was attached to and made a part of it, for election purposes. Any other construction of these acts would involve the absurdity of considering the unorganized territory as contemporaneously attached to two or more different counties.

It may admit of doubt whether the Pottawatomie country, in which Kanesville was situated, was intended to be attached either to Monroe or to Mahaska county by the acts of June 11, 1845, or February 5, 1844. At those times the country belonged to the Pottawatomie Indians, whose title was not extinguished until by the treaty of 1846. During the continuance of that title the jurisdiction of Iowa did not extend over the country. In the case of Worcester against the State of Georgia, (6 Peters, 515,) the Supreme Court decided that the Cherokee nation was a distinct community, occupying its own territory, with boundaries accurately defined, in which the laws of Georgia could have no force, and which the citizens of Georgia had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties and with the acts of Congress. The principle upon which that decision rests seems to be equally applicable to the Pottawatomies.

But, without discussing this question further, we proceed to inquire how the elective franchise of those resident in this attached county could be exercised. Under the constitution and laws, they could vote at any place of holding an election within the county proper to which they were attached. But what power had the commissioners of the organized counties to provide places for holding elections within the country thus attached? By an act of the legislature of Iowa passed January 21, 1847, it was enacted "that the board of commis-

sioners of each county which shall not be divided into townships when this act takes effect, and of any county to which any county or counties not so divided shall at that time be attached, for election or judicial purposes, shall, at any regular or called session, as early as practicable, divide such attached county or counties into townships of size and shape most convenient to the inhabitants, giving to each such name as the inhabitants thereof may prefer, and shall appoint a central and convenient place in each township for holding the first township election; and the clerk of the board shall record the name of each township, with a particular description of its boundaries; and every county afterwards established or organized shall be divided into townships, in like manner, at any regular or called session of the board of commissioners thereof, or of the county to which the same may be attached." Presuming, probably, that under this act they had sufficient authority, the board of commissioners of Monroe county, on the 3d day of July, 1848, made the following order:

Ordered by the board of commissioners of Monroe county, and State of Iowa, that that portion of country called Pottawatomie county, which lies *directly* west of Monroe county, be organized into a township, and that Kanesville be a precinct for election purposes in said township; and that the election be held at the council-house in said village; and that Charles Bird, Henry Miller, and William Huntington be appointed judges of said election: and that the boundaries of said township extend east as far as the east Nishnabotna.

Acting under this order, Charles Bird, Henry Miller, and William Huntington opened a poll at the council-house in Kanesville, at the general election on the 7th of August, 1848, at which 493 votes were given for Daniel F. Miller for a representative from the first congressional district, and thirty votes for William Thompson. A certified copy of the poll-book was forwarded to the clerk of the board of commissioners of Monroe county, in the manner and within the time prescribed by the statutes of the State for election returns; but the clerk refused to receive it and submit it to the board of canvassers, as required by law. The poll-book was then taken from the clerk's office, and retained by some persons not entitled to its custody until after this investigation was in progress. Your committee would not be understood as justifying the conduct of the clerk of the board of commissioners of Monroe county, or of those who abstracted the poll-book and subsequently detained it; on the contrary, we think it merits the severest censure. The clerk had, under the law, no authority to refuse to receive that which purported to be a return from an election district. It was his duty to receive the return and lay it before the legally constituted board of canvassers, of which he was a member. But his act, censurable though it be, does not affect the decision of the question whether the board of commissioners of Monroe county acted with or without legal authority in organizing a township, appointing judges of the election, and directing a poll to be opened at Kanesville, and whether the votes there received can be legally counted in ascertaining the result of the election in that congressional district.

Waiving, for the present, the consideration that Kanesville was not in any country attached to Monroe county, and that a majority of those who voted there were residents of the territory attached to Mahaska county, we proceed to inquire, 1st, whether the order made by the board of commissioners was authorized by law; and 2d, whether, even if it was, it authorized opening a poll at the August election. We think they had authority to establish townships in any country attached to Monroe. The country attached was a part of the county. The constitution of the State declares that "any country attached to any county for judicial purposes shall, unless otherwise provided for, be considered as forming a part of such county for election purposes;" and, by an act of the legislature of July 28, 1840, it was provided as follows: "All the country that is at present, or may be hereafter, attached for revenue, election, or judicial purposes, and the inhabitants thereof, shall be entitled to and enjoy all the rights and privileges of the county or counties to which they are attached

they would be entitled to were they citizens proper of some organized ity." Township divisions are, in part, for "election purposes;" and the act cited gives every right and privilege which the citizens of Monroe county er had. It would seem to follow, then, that the act of January 21, 1847, to the commissioners of Monroe the power to establish townships in the itry attached to it. But the power to erect a township there was limited to g its boundaries, giving it a name, and appointing a central place within it holding the first *township* election. They had no authority to appoint es; and any persons appointed by them to act as judges would act, if they l at all, without any legal sanction. In all cases of townships, the first on of the act of June 5, 1845, requires that the electors present shall, at first meeting, elect, by ballot, three persons to act as judges of the ion, and, at all subsequent elections, the third section of the same act directs the township trustees shall be the judges. In this view of the case, the r of the board of commissioners of Monroe county was entirely unauthorized, in contravention of the plain provisions of the law. It is argued, however, the power to appoint judges was vested in the commissioners by the 3d on of "an act providing for and regulating general elections," passed in . The third section of that act provides "that the county commissioners , respectively, at their regular annual session in July preceding the general ion, *where the counties are not organized into townships*, appoint three ble and discreet persons, possessing the qualifications of electors, to act as es of the elections at any *election precinct*, and for each of the polls of the ion, as provided for in the act setting off towns or districts," &c. The section provides that, "in all organized townships, the trustees of said ships shall act as judges of all elections held under the provisions of this It is obvious, however, that the appointment of judges for which pron was made in this act could only be for election *precincts*, as distinguished *townships;* and this conclusion is rendered inevitable by reference to the f June 5, 1845, already cited, which devolves upon the electors in each ship the duty of electing judges at their first election. It is true that the f January 21, 1847, directs the commissioners of counties to which unorzed *counties* are attached to lay out townships in these attached *counties*. organized *country* is not intended, if that is not to be considered as *part* e county proper and subject to municipal division, then the commissioners onroe could not establish a township in the attached country, and the right eate *election precincts* there and appoint judges was vested in them. under ct of 1843. We have already submitted our reasons for the belief that the f January 21, 1847, embraced all attached *country*. So the board of comioners of Monroe understood it. Their order purported to create a *town*, fixed its boundaries, and designated Kanesville as the place of holding election. They acted, therefore, under the law of 1847, and not under of 1843. We repeat, therefore, that the appointment of judges of the ion in that township was unauthorized by law, and that judges thus inted could not legally act. But if this were not so, neither the act of ary 21, 1847, nor the order of the commissioners, warranted any other than *nship* election, as contradistinguished from a *general* election. The duties e commissioners are declared in the act to be preliminary to the "*first ship election.*" By the laws of the State, all township elections are to be on the first Monday of April in each year; and therefore any election in new township, thus established, was entirely unwarranted until the first day of April, 1849.

more serious objection to the reception of the vote at Kanesville still ins. The evidence which has been submitted conclusively establishes the ion that Kanesville, the place designated in the order of the commissioners, least six miles north of any part of Monroe county, and in a district which

never was attached to Monroe for election or any other purposes. This is shown beyond doubt by the statement of Charles Mason, (page 55,) admitted by the contestant as evidence, (pages 55 and 56;) by the testimony of John W. Webber (pages 58 and 59) and Jonathan F. Strattan, (pages 112 and 113.) It is also admitted by the contestant (page 35) that a majority of those who voted at Kanesville in August, 1848, resided north of a line running due east from the Missouri river, five miles south of Kanesville. Consequently, they resided north of the north line of Monroe county. Of course, they had been attached to Mahaska county, and, under the constitution of the State, they could vote only in Mahaska county. How, then, can it be asserted that their votes could be legally counted, except in violation of the constitutional provision expressly restricting the right to vote to voting in that county in which the elector was resident? It is not pretended that Kanesville was an election district of Mahaska. The votes are claimed as belonging to Monroe. In many of the States the right to vote is confined by law to voting in the ward or township in which the elector resides; and, even under this more stringent provision, votes in other wards or townships have, it is believed, been uniformly adjudged illegal.

And again, Kanesville being proved to have been in a county which was neither a part of nor attached to Monroe, it is perfectly obvious that the board of commissioners of that county had no more authority to establish an election district there than they had to establish one in Mahaska county proper. The board was a court of limited jurisdiction. Beyond the prescribed limits of its jurisdiction its acts were, of course, nullities, and neither gave nor took away any right. Nor can it be said that by these views the voters at Kanesville are disfranchised. The act of the Monroe commissioners did not affect them. They might have voted, as before, in any election district of Mahaska to which they were attached. Nor is their belief that they were rightly voting at Kanesville at all material, though it may have been their misfortune. Their right to vote was a political right restricted by their *actual* residence, and not by what they may have supposed it to be. The opposite doctrine would convert the constitutional provision into a declaration that the voter should vote in the county in which he supposes he resides, and make his franchise dependent upon his own conjecture. The vote at Kanesville was therefore unwarranted and illegal, and cannot properly be counted.

The next question presented in the case is whether the vote of Boone township, Polk county, should be rejected, as is claimed by the contestant. The vote of this township was: forty-two for William Thompson, and six for Daniel F. Miller. The contestant claims that these votes should be rejected, because, as he alleges, Boone township was in the second and not in the first congressional district.

By the act of the legislature of Iowa of February 22, 1847, the State was divided into two congressional districts; and the first district was declared to embrace "the counties of Lee, Van Buren, Jefferson, Wapello, Davis, Appanoose, Henry, Mahaska, Monroe, Marion, Jasper, Polk, Keokuk, *and all of the country south of a line from the northwest corner of the county of Polk running west to the Missouri river.*" The second district was declared to embrace the "counties of Clayton, Dubuque, Delaware, Jackson, Clinton, Jones, Linn, Poweshiek, Benton, Iowa, Johnson, Cedar, Scott, Muscatine, Washington, Louisa, Des Moines, *and all the country north of a line from the northwest corner of the county of Polk running west to the Missouri river.* By an act of the legislature of January 13, 1846, section 8, the boundaries of Boone county were established, and the south line was declared to be the division line between townships 81 and 82—it being an extension of the north line of Polk county. Prior to the congressional election in August, 1848, although its boundaries had been thus established, it had never been organized; and by an act of January

17, 1846, "the counties of Story, Boone, and Dallas, (afterwards organized,) and the territory of country north and west of said counties," was "attached to the county of Polk for revenue, election, and judicial purposes." In pursuance of this legislative provision, the commissioners of Polk county in 1847 established a township in this attached country, embracing the whole of it, and called the township of Boone. In 1848 they divided this township, calling the southern half Jefferson and the northern half Boone. This division could not, however, take effect until the township elections, which were fixed by law in the spring of 1849. The electors resident in this Boone township voted at the congressional election, and their votes were returned and counted in Polk county, to which the township had been thus attached. For all election purposes—for all the purposes of this investigation—Boone county or Boone township was as much a part of Polk county as was any township within the county proper. The constitution of Iowa declares that any country attached to any county for judicial purposes shall, unless otherwise provided for, be considered as forming a *part* of said county for election purposes. But, unless the vote of Boone township be received and counted as a part of Polk county, this constitutional provision becomes a nullity, and the voters of Boone are entirely disfranchised. Their vote could be received and counted at no other place. No provision was ever made for their voting in any other county than Polk. The electors at Kanesville could have voted, had they chosen to do so, in the county lying east of them, to which they had been attached; but these voters could have had no voice in the choice of a representative unless their votes had been received as a portion of the vote of the first district, of which Polk county was declared to be a part. It is, however, objected that the constitution also contains the following provision: "No county shall be divided in forming a congressional, senatorial, or representative district." It is urged that if Boone is to be considered as forming a part of Polk county, then a county has been divided in forming a congressional district, and therefore the districting act must be considered as repealing the antecedent act attaching Boone to Polk. To this it may be answered that if, within the meaning of the constitution, the districting act did divide Polk county by separating Boone township from it, the act itself is unconstitutional and inoperative so far as it aims to sever Boone from the county of which, under the constitution and law, it forms a part. Nor does there appear to be the least reason for asserting that it repealed the act attaching Boone to Polk. It does not purport to repeal any law; and it might with equal force be contended, had it run the line dividing the two districts directly through the centre of Polk county proper, that it repealed the law by which the boundaries of Polk were established. But such is not the true meaning of the constitutional provision. Unquestionably its design was to guard against the division of the votes of the inhabitants of any county—to provide that all the votes of the electors of each county should be counted together, and certified as an entirety, not in fragments. The commissioners of each county are required by law to certify an abstract of the vote of each county to the secretary of state. The abstract thus certified is a record of the entire vote of the county, including all which is appurtenant to it. That abstract may not be divided; and the design of the constitutional provision would ill be answered by severing from the remainder the votes of a constituent part of Polk county, though only an adjunct.

There seems, therefore, to be no satisfactory reason why the vote of Boone township should not be counted in Polk, and in the first congressional district.

It remains to consider the third and only other question which has been contested in the case: Should the fifty-six which were received and counted in Boone township, Dallas county, be rejected from the aggregate, as officially reported? The facts in regard to this question may be briefly stated as follows: From the official return of the election held in that township, (pages 92

and 93,) seventy-two votes appear to have been received. Of these, fifty-six whose names are given are alleged to have lived out of the county, and to have had no right to vote there. The testimony of Reuben Oaks (page 31) and Hiram Oaks (page 35) proves that they and more than fifty others went, immediately before the August election of 1848, from Pottawatomie county (a distance of one hundred and forty miles, and more than sixteen days' journey) to Dallas county, and voted there. The persons went from the Mormon settlements west of the Nishnabotna. Nor is this all. The exact place of residence of most of these persons is shown; and they are the persons whom the poll-books show to have voted at Boone, in Dallas county. One is proved to have resided in the neighborhood of Kanesville; nine are proved to have resided at Honey Creek settlement, fifteen miles northward from Kanesville; ten at Bybe settlement, two miles east of Honey Creek; six at Big Pigeon, ten miles east of north from Kanesville; two at Key Creek, fifteen miles northeast of Kanesville; two at Drun's Mill, eleven miles northeast of Kanesville; and seven at Harris Grove, a place said by Reuben Oaks to be near forty miles east of northeast from Kanesville. The place of residence of the others who went in this company is not proved, though five others are recognized by Reuben Oaks, Hiram Oaks, and E. M. Greene as having been in the party. The House is left to infer the place of residence of the others from the fact that all went in a body from Pottawatomie county; and it is but a fair presumption that they all resided in the same neighborhood. Of all the places named at which these persons resided, Harris Grove seems to have been most distant from Kanesville, and most northward. But the testimony satisfactorily shows that Harris Grove was at least two miles south of the south line of Dallas county, and, therefore, that alike Harris Grove and all the other places at which these persons resided were south of any portion of country which had been attached to Dallas for election purposes. The records of the land office, and the testimony of James M. Marsh, (page 53,) as well as that of Charles Mason (page 54) and John W. Webber, show that, under authority of the United States, and in prosecution of the public surveys, a correction line was run to the Missouri river in the fall of 1848, between townships 78 and 79 north, and west of the fifth principal meridian. It is also agreed by the contestant (page 78) that Harris Grove is "eight miles south of the correction line run through to the Missouri river by the United States surveys in the fall of 1849." It will be observed that this agreement speaks of a correction line run in 1849, while that between townships 78 and 79 was run in the year 1848. It cannot be doubted, however, that reference is made to the same line. The records of the land office show no other correction line run in that vicinity than that run by Mr. Marsh in the fall of 1848; and it would be extraordinary if there were, for it is of unfrequent occurrence, and useless in prosecuting the public surveys, to run correction lines within less than about sixty miles from each other. It being admitted, then, that Harris Grove lies eight miles south of this correction line dividing townships 78 and 79, it necessarily follows that it is south of the south line of Dallas county, and consequently that all the persons referred to in the depositions of Reuben Oaks, Hiram Oaks, and E. M. Greene could not legally vote in Dallas county. The act of the legislature of Iowa, approved January 17, 1846, defines the boundaries of Dallas county as follows: "Beginning at the northwest corner of Polk county; thence west on the line dividing townships 81 and 82 to the northwest corner of township 81 north, of range 29 west; thence south to the southwest corner of township 78 north, of range 29 west; thence east to the southeast corner of township 78 north, of range 26 west; and thence north to the place of beginning." From this it appears that the south line of Dallas county is the line dividing townships 77 and 78. As the townships are all six miles square, the correction line, being between townships 78 and 79, is only six miles north of

the southern boundary of the county. Harris Grove, therefore, was not within the country attached to Dallas for election purposes, but was attached to Mahaska, a county in the next range south; and in Mahaska only could the persons referred to by Oaks and Greene vote.

Why they attempted to vote in Dallas, it is not very material to inquire. It is worthy of observation that they went from the vicinity of Kanesville, and, therefore, must have known either that that place was not west of Monroe, or that their places of residence were not west of Dallas. But how many of these votes should be discarded? More than fifty went in the company. Only forty-two, however, have been recognized by Reuben Oaks, Hiram Oaks, and E. M. Greene. These, it is agreed by the contestant, with the exception of four, voted for him, (page 92.) It follows that he received at least thirty-eight illegal votes; and we are of opinion that that number should be deducted from the number returned as having voted for him.

Your committee have thus presented all the questions the consideration of which is necessary to the adjudication of the case. Much testimony has been introduced by both the parties which, in our estimation, has no relevancy to the actual merits of the controversy. The conduct of the friends of the parties, or even of the parties themselves—the facts that electors acted under an honest though mistaken impression as to their rights; that the commissioners of Monroe were the political friends of one of the litigants; that the canvass was conducted by the friends of the candidates as if the election at Kanesville was regular and legal; or even that a majority of the legal voters resident within the district, in some mode and at some place, expressed their preference for one of the candidates—are matters entirely foreign from a legitimate consideration of the question, Who is entitled to the seat? The House, in judging of elections, has no discretion to exercise. It acts in a judicial character; and the only thing to be adjudicated is this: Who has received a majority of the votes of the electors in the district, polled at the time, in the manner, and at the places prescribed by law?

Upon reviewing the conclusion thus submitted, the correct statement of the votes received by the sitting member and the contestant is as follows:

For William Thompson.

	Votes.
Official abstract as returned	6,477
White Oak, Mahaska county	53
Chariton, Appanoose county	16
Wells, Appanoose county	11
Total vote received by William Thompson	6,557

For Daniel F. Miller.

	Votes.
Official abstract as returned	6,091
Rejected votes in Marion	7
White Oak, Mahaska county	16
Wells, Appanoose county	3
	6,117
Deduct illegal votes in Dallas given to contestant	38
Total vote received by Daniel F. Miller	6,079
Majority for William Thompson	478

It is apparent, therefore, that, even if the vote at Kanesville be received and counted, the result remains unchanged. The Kanesville vote was: 493 for Daniel F. Miller, and 30 for William Thompson. If this vote be added to the aggregate above stated, it stands:

For William Thompson.

	Votes.
Aggregate as above	6,557
Add Kanesville votes	30
Total	6,587

For Daniel F. Miller.

	Votes.
Aggregate as above	6,079
Add Kanesville votes	493
Total	6,572
Majority for William Thompson	15

In every aspect, therefore, in which the case can be justly considered, your committee are of opinion that William Thompson received a majority of the votes which were legally polled, and was duly elected a representative to the thirty-first Congress from the first congressional district of Iowa.

They submit the following resolution:

Resolved, That William Thompson is entitled to the seat in this house which he now holds as the representative from the first congressional district of Iowa.

Mr. VAN DYKE, from the minority of the Committee of Elections, made the following report:

That the whole number of votes which were counted by the congressional canvassers for the State of Iowa for the said contestant and for the said sitting member, in the said first congressional district, was 12,568, of which number the contestant had 6,091, and the said sitting member 6,477—giving to the said sitting member a majority of 386.

It appears, however, by the statements and admissions of the parties, and the evidence taken in the case, that the votes cast in a number of the election precincts in said district were not counted by the election officers, and did not in any way contribute to the result above stated. It further satisfactorily appears by the evidence, that, of all the votes cast in the said district by persons residing therein at the time, and who, for aught that appears, had an undoubted right to vote in the said district, the contestant has a majority of 59. It is insisted by the contestant that the sitting member received and had counted for him certain votes given by persons not then residing in the said first district, and who had no right to vote therein; and that a large number of legal votes were cast within the said district for the said contestant which were not in any way counted for him in the said district by the said congressional canvassers, although they were counted and allowed by the officers holding the elections. On the other hand, it is insisted by the sitting member that the said contestant had counted and allowed to him, in the said first district, a number of votes which were illegally cast, and which, for that reason, should have been rejected by the said canvassers; and also that a number of lawful votes were cast for said sitting member, in the said first district, which should have been counted

and allowed to him, but which were rejected and not counted by the said canvassers.

The only questions of difficulty which present themselves are the proper admission or rejection of the votes thus placed in controversy and dispute; and although the committee has not been unanimous on many of the points presented for its consideration and decision, yet on each of the points thus presented there has been such a decision by a majority of the committee as to give to the contestant the seat which he claims.

In the first place, the contestant insists that seven votes which were cast for Daniel F. Miller in Pleasant Grove township, in the county of Marion, omitting the middle letter in the name of the contestant, and which were not counted by the said canvassers, should be counted and allowed to him. If these votes were really cast for the contestant, and the omission of the middle letter arose from a want of knowledge of the use of such letter on the part of the voters, it would be extremely technical and harsh to disallow such votes; but it appears by the admission of the sitting member, through his counsel, that the only candidates nominated for representative were Daniel F. Miller—sometimes called Dan Miller or Daniel Miller—William Thompson and Mr. Howe. The committee, therefore, are satisfied that the said seven votes were honestly intended for the contestant, and allow them accordingly—increasing the number of votes to be counted for the contestant to 6,098. These votes were allowed him by the officers holding the election, but not by the canvassers.

It is insisted, secondly, by the contestant, that the votes given at Kanesville, in election precinct near the Missouri river, established as such by the board of commissioners of the county of Monroe, and supposed to be attached to that county for election purposes, and which votes, although allowed by the officers holding the election there, were illegally suppressed and never allowed to reach the said congressional canvassers, should now be counted and adjudged to be a part of the legal vote of the said first congressional district. The whole number of votes cast at the Kanesville precinct was 523; of this number 493 were cast for the contestant, and 30 for the sitting member. This is a question of much importance. It is not a matter of a few illegal votes, but it is one of the admission or destruction of the vote of an entire township or precinct, and that one of the largest in the State. It is fully established, as well as admitted, that the persons voting at this precinct had a perfect right to vote in the first congressional district, and to vote for either the contestant or the sitting member. It is not pretended that any fraud, injustice, or unfairness was practiced by either the voters or the election officers towards any one, but everything seems to have been done honestly, fairly, and in good faith, and that the persons voting were legal voters in the district; while the whole proceedings touching the election were assented to and participated in by all men and all parties there, and were objected to by none. And in view of these facts, and in view of the great principle in our institutions which seeks to afford to all the citizens of the Union the right of suffrage, the committee believe that the reasons for wholly setting aside the election in this precinct should be exceedingly strong. These reasons are strictly and purely technical in their nature; and, although they are entitled to a proper consideration, yet they ought not, in the opinion of the committee, in the absence of all improper conduct, to be allowed to destroy the votes of so large a portion of the citizens of Iowa, whose right to vote in the first district, and for either of the two candidates, is, since the taking of the testimony, unquestioned.

The State of Iowa lies between the Mississippi and Missouri rivers. The counties in the eastern part of the State were first organized, and, as the organization of counties proceeded, there always remained unorganized country lying westward of them of from one hundred to two hundred miles in extent. By a number of acts of the legislature of the Territory, as well as of the State of Iowa,

all the country lying west of certain organized counties was attached to such counties, for "election, revenue, and judicial purposes;" and the inhabitants of such attached country were "entitled to enjoy all the rights and privileges of the counties to which they were attached that they would be entitled to were they citizens proper of some organized county." And in accordance with this practice, the legislature of Iowa, on the 11th day of June, 1845, passed an act organizing the county of Kishkekosh, and attached to it the territory west of said county, "for election, revenue, and judicial purposes." On the 19th day of June, 1846, the legislature of said State, by an act for that purpose, changed the name of this county from Kishkekosh to Monroe.

By an act of the legislature of Iowa approved February 15, 1843, a board of county commissioners was required to be organized in each of the counties "for transacting county business." This board was made a body "corporate and politic" by the act. And by another act of February 17, 1842, "for the organization of townships," these boards are authorized to "divide counties into townships," "and appoint the place where the first meeting of the electors shall be holden." But by another act of the legislature, entitled "An act providing for and regulating general elections," which went into operation July 1, 1843, these boards of county commissioners are required, "at their regular sessions in July preceding the general election, where the counties are *not* organized into townships, to appoint three capable and discreet persons to act as judges of the election at any election precinct." And under this authority these boards of commissioners have always been in the practice and habit, in the unorganized country, of appointing not only the judges of election, but of fixing also the precinct or place where the election should be held wherever they supposed the convenience of voters required it. And accordingly we find by the evidence that, at the term of July of these boards of commissioners immediately preceding the general election in 1848, a number of election precincts in unorganized territory were created, and a number of townships in organized territory were organized, and judges of election appointed for them all, respectively.

Among the number of election precincts created at the said July term of the said boards of commissioners was the one at Kanesville, which was established, and the judges of election appointed, by the board of commissioners of the county of Monroe. Kanesville was some 125 miles from the western limit of Monroe proper, and was in a wild and unsurveyed country; but everybody, it seems, both in Monroe county proper and at Kanesville, and elsewhere, supposed and believed that it was within the country attached to the county of Monroe for election, revenue, and judicial purposes. There had not at that time been any lines run fixing the boundaries of counties in that part of the country, and no one could possibly tell the precise place of such boundaries.

It turns out, however, by surveys made since the election of 1848, that Kanesville lies some five or six miles north of the northerly line of Monroe county, as run due west from the northwest corner thereof; and the question is, whether this fact should be permitted to annul the whole election, when all the persons voting had a perfect right to vote for either of the two candidates on one side or the other of the line. If it were a question of conflicting jurisdiction between two adjacent counties, it might be entitled to more weight; but no such question arises here. Nor can the sitting member complain that this mode of voting does him any injustice; for if these votes had been cast on different sides of the line, as he insists they should have been, they would with still more certainty have defeated his election, if that election depends upon these votes.

But, although there was at the time no governmental line run between the county of Monroe and the county lying north of it, yet there was an understood line, a claimed line, an admitted line. That line ran north of Kanesville, and according to that line the authorities of Monroe claimed and exercised jurisdic-

tion over Kanesville as a part of that county. This jurisdiction was assented to by the people of Kanesville, and has never been resisted by the county of Marion, in which Kanesville is now alleged to be situated; and, although it is now said by persons who have recently run a line, that a course due west from the north line of Monroe will place Kanesville north of that line, yet there has never, up to this time, been any such settlement or adjudication of the question as to this line as to overturn or shake the jurisdiction which Monroe county exercised over Kanesville. It is a well-known historical and judicial fact, that, as between the State of Iowa and the State of Missouri, the latter claimed and exercised jurisdiction for a long time over territory to which she had in fact no legal right, and which, in truth, formed a part of Iowa. Yet the State of Missouri, like the county of Monroe, assumed that the line between her and Iowa ran north of certain inhabitants there residing, and accordingly extended her laws over them, and brought them within her jurisdiction for all purposes. This claim was resisted by Iowa; and, upon an after investigation of the facts and law of the case before the Supreme Court of the United States, it was decided by that tribunal that the line did not run where Missouri claimed it to be, but —— miles south of it; and such decision must also have determined that Missouri never had any legal right to exercise jurisdiction over the disputed territory or its inhabitants, at the time she exercised it. But does this decision and determination of the Supreme Court necessarily annul and destroy all the acts of jurisdiction which the State of Missouri exercised over the territory while she adversely held it in actual possession? Are all the taxes she collected of those people now to be returned to them? Has every punishment of an offender now become a crime against the public functionaries who inflicted it? Is the service of every process by a sheriff or constable now become a trespass on the part of such officer, and the service good for nothing? Certainly not. The jurisdiction of Missouri over the part in dispute is at an end; but the legislative, judicial, and executive acts which she exercised over it while in her custody, so far as all citizens are concerned, are as valid as any other of her acts. So with the county of Monroe. She assumes that the line between her and Marion runs north of Kanesville, and extends her jurisdiction accordingly over the people, and enforces her laws among them. This assumption is unresisted; and, admitting it to be altogether wrong in law and in fact, yet, if it is continued, and never determined to be otherwise, can it be contended with truth that all such exercise of jurisdiction is absolutely void—and that, too, when the question is raised, not directly, but in a collateral way, and before the most equitable and least technical of all tribunals, the House of Representatives? The committee think not.

Nor do the committee see that either the contestant or any of his friends can be charged with any unfairness in this matter. The entire board of commissioners of the county of Monroe were the political friends of the sitting member. A majority of the election officers at Kanesville were also his political friends. A number of other influential friends of his went a long distance to Kanesville prior to the election on an electioneering campaign in his behalf; while the actual sheriff of Monroe county, a political friend of his, did the same thing, and was at Kanesville and voted there on the day of election. The contestant, it seems, had political friends at Kanesville; but it does not appear that either he or any of his friends from a distance ever visited Kanesville at or before the election for political purposes. No question was raised at any time by any one against the correctness of the proceeding, until after the election. The balloting seems to have been conducted, and the poll-book kept, with more than usual care and regularity.

The poll-book in this case was duly made up and delivered by the proper officer to the clerk of the board of commissioners of the county of Monroe, as the law requires, whose duty it was to receive it, and at the proper time, with

the assistance of two justices of the peace, to open it, and make an abstract of the votes of that and other precincts, and transmit them to the secretary of state, to be counted and canvassed by the board of canvassers. But the clerk of the board of commissioners of Monroe county, without calling to his aid the two justices of the peace, as the law requires, but under the advice of J. C. Hall, esq., one of the attorneys of the sitting member, (and who travelled a hundred miles to give such advice,) refused to receive or take care of the Kanesville poll-book; and it was actually carried away by some one, but no one knows who or how, except that through some unknown agency it was found in the carpet-bag of Mr. J. C. Hall before he got home, as he now tells us in his evidence. Mr. J. C. Hall gave the poll-book to the sitting member in the spring of 1849, who, in the winter of that year, disputed the existence of such a poll-book before the committee; but, on the 19th day of February last, Judge Mason, another of the attorneys of the sitting member, in attempting to serve, at his own office, a notice on the contestant to take testimony in the case, accidentally, as is supposed, served on him the original poll-book of the Kanesville precinct!—which the contestant, after duly examining it in the presence of several other persons, returned. This poll-book was, of course, never before the congressional canvassers; but the committee think that, under all the circumstances of the case, the vote of this precinct should be received and counted, which will increase the number of votes given to the contestant to 6,591, and the number given to the sitting member to 6,507.

It is also insisted by the contestant, that the vote cast in the township of Boone, in the county of Boone, but counted in and added to the vote of the county of Polk, was improperly counted and allowed by the board of canvassers, and should now be deducted from the general result or aggregate of votes counted in and for the first district. The votes given in this township were: for the contestant six, and for the sitting member forty-two. This township of Boone, and the county of Boone, in which it is situated, are, in fact, not in the first but in the second congressional district of Iowa, and all the persons who voted in this township of Boone actually resided in the second congressional district at the time they voted. About this there is no dispute, as the districting line of Iowa places the whole of Polk county in the first district, and the whole of Boone county in the second district; and the only ground on which it is claimed that these votes given in Boone were correctly counted in Polk county is, that, by an act of the legislature of Iowa approved January 17, 1846, Boone county was attached to Polk county, for election, revenue and judicial purposes, and that the constitution of that State prohibits the division of counties in making congressional districts. But, by an act of Congress approved June 25, 1842, every State that is entitled to more than one representative is required to vote by district—each district is to elect one representative, and no more; and in pursuance of this act of Congress, the State of Iowa, on the 22d of February, 1847, divided herself into two congressional districts, denominated the first and second districts. Now, it seems impossible that Congress, when it passed this districting act, confining each district to one representative, could have intended that, for congressional purposes, the inhabitants and residents of one district could lawfully vote in another. And can it be supposed that the State of Iowa, when, subsequently to all these other laws, she ran a line across her territory dividing it into two districts, meant to say, that after all, that line meant nothing, and that the inhabitants living in one district, when voting for representatives in Congress, might still vote in the other district? Such supposition, the committee believe, cannot be admitted. If this principle be once allowed to prevail, where is it to end? Will it not entirely destroy the whole district system?

And further: If the construction insisted on by the sitting member be correct, it will carry the votes of one-half of the second district into the first; for the same act and the same section which attaches Boone to Polk county, for

election purposes, also attaches, for the same purposes, the counties of Story and Dallas, and likewise all the country lying north and west of the said three counties of Story, Boone, and Dallas, which, according to the map of the State, will take in nearly if not quite half of the territory of the second district; and the voters in all that section of the second district thus included within the first had the same right to have their votes counted in the first district as those living and voting in the township of Boone. Such a principle, if allowed, would at any time enable a strong district that had votes to spare to turn the scale in a neighboring district that needed aid. But such, the committee believe, is not the law of the land, nor its intention; and, as the voters in Boone township did not reside at the time in the first district at all, but in the second district, in which, if anywhere, they had a right to vote for a representative in Congress, and as, in consequence, they certainly had no right to vote for either the contestant or the sitting member at any place, the committee think that this vote of Boone township should be excluded, which being done will reduce the number of votes given to the contestant to 6,585, and the number given to the sitting member to 6,465.

On the other hand, the sitting member claims that in the township of White Oak, in the county of Mahaska, 69 votes were polled at the election in August, 1848; that 53 of these votes were given for the sitting member, and 16 for the contestant; that these votes were rejected on the ground that it did not appear that the judges of election had been sworn. A copy of the poll-book is before the committee, and it satisfactorily appears by the evidence taken that the judges were in fact sworn; and the committee are unanimous that the votes should be received and counted, which being done will increase the number of votes given to the contestant to 6,601, and the number given to the sitting member to 6,518.

A claim precisely similar is made by the sitting member to 16 votes cast for him in the township of Chariton, in the county of Appanoose, which were rejected for the same reason as those in White Oak. It is also proved that the judges of election were, in fact, sworn; and the committee think the votes should be received and counted, which being done increases the number of votes given to the sitting member to 6,534. It is also insisted by the sitting member that he should be allowed 11 votes, and the contestant three votes, cast in the township of Wells, in the county of Appanoose. It appears that these votes were rejected for informality. It does not appear by the election proceedings that the officers of election were sworn, nor is it at all proved in any other way. And although it appears that *W. Thompson* and *D. F. Miller* were voted for for Congress, yet it does not appear how many votes either of them received; and the only mode of *inferring* that either of them received any votes at all is that the poll-book states that, for "*superintendent of public instruction*," W. M. Thompson received 11 votes, and that for the same office D. F. Miller received 3 votes. No proof is brought to bear on this case to prove anything whatever about it; and if ever irregularity or illegality should set aside an entire poll, it should be such as this. But the committee, from a very strong indisposition to deprive the citizen of his right to vote in consequence of the errors and blunders of others, nevertheless allow this vote to be counted, which increases the number of votes cast for the sitting member to 6,542, and those of the contestant to 6,604.

It is further and lastly insisted by the sitting member that 52 votes were illegally cast for the contestant in the county of Dallas, and that they should now be deducted. If this whole number were deducted from the votes heretofore allowed to the contestant by the decisions of the committee, he would still have the largest number of votes, and would consequently be entitled to the seat. The whole number of votes given at this poll is: for the contestant 62, and for the sitting member 10. The county of Dallas, like other counties, had

the country lying west of it attached to it for election and other purposes; and it appears that a number of persons not living within the limits of Dallas county proper, but living westwardly thereof, voted in a precinct in that county. It is contended by the sitting member that the persons living south of the southerly line of Dallas were not legal voters in that county, and so a majority of the committee have determined. Two questions present themselves for consideration: first, how many of these persons voted for the contestant? and secondly, on which side of the southerly line of Dallas county did they reside? The only evidence as to whom they voted for is found in the admission of the contestant. He admits that the persons recognized by Oaks and Green in their testimony voted in Dallas and for him, except four. The whole number of persons recognized by Oaks and Green, jointly and severally, amounts to 40. Of these, the votes of three are unknown, and one did not vote, reducing the number of those who voted for the contestant, as proved or admitted, to 36.

These votes were all received as legal votes by the judges of election, who are presumed to have made all due inquiry and to have decided correctly, and must also be presumed to have had as much knowledge of the southerly line of Dallas as any of us, acting as we do without any evidence on the subject. These votes were also counted and allowed by the board of congressional canvassers of the State of Iowa, and every presumption must be in favor of their legality until the contrary be fully established. The sitting member contends that these votes are illegal, because the voters resided on the south side of the southerly line of Dallas. In attempting to establish this the burden of proof rests entirely on him. In undertaking to overthrow the decisions and adjudications of Iowa, he must not leave us to guess that those decisions may be wrong, but he is bound to *prove* it beyond all reasonable doubt.

Among the persons recognized by Oaks and Green are five whose places of residence at the time of election no one who has testified knows; and as their votes were duly received and presumed to be legal, and as no one locates them out of Dallas county, or in any way shows why they are illegal, they must be considered as legal votes; and, being so considered, it will reduce the number of those alleged to be illegal to thirty-one, (31.)

Of the remaining thirty-one voters, the residence of each in his particular settlement is given; and it was quite as easy for the sitting member, who objects to these votes, to have shown, by survey or otherwise, on which side of the southerly line of Dallas these settlements were, as it was to show on which side of the northerly line of Monroe Kanesville is situated. But he has done no such thing, and has not even attempted it; nor had there been at that time, nor has there been since, any line run through that section of country where these voters resided showing the southerly line of Dallas.

These voters all resided either in the country attached to Dallas county or in the country attached to Marion county—that being the county immediately south of Dallas, and lying between it and Monroe county. They had a right to vote in one county or the other beyond doubt; and, according to the testimony of all the witnesses that have been examined on this part of the case, these voters all thought that their places of residence were in Dallas county, and that they were lawful voters there, and accordingly went there and deposited their votes. They might have done so quite as well and as easily in Marion county; but they were satisfied that their voting-place was in Dallas, and they went there accordingly. So far, therefore, as the persons living in that region of country were competent to prove the line between the counties, these witnesses prove it to have been south of those settlements.

Of the 31 voters last named, it appears from the testimony that ten of them resided within ten or twelve miles of Kanesville; and, under the evidence in relation to that precinct, it may not be unreasonable to suppose that these ten voters resided south of the line in question.

With regard to the remaining 21 voters, 14 of them, it is proved, resided at Honey Creek and Bybe settlements—*called* fifteen miles north of Kanesville. Now, if Marion county be twenty miles wide from north to south, then these voters all resided, in fact, in Dallas. If Kanesville has been properly located by the sitting member, and if Monroe be more than twenty miles wide, of which we have no certain evidence, then these voters are brought so near the line as to render it impossible for the committee to determine that they *certainly* lived south of the line; while the remaining seven voters resided at Harris Grove, forty miles from Kanesville, in a direction east of northeast therefrom. Now, it is perfectly certain that a line running east of northeast from Kanesville, and continued for forty miles, will bring you into the country attached to Dallas county for election and other purposes, so that there are but ten of the votes given for the contestant in Dallas county that can, with any kind of propriety, be pronounced illegal; and if these be deducted from the number given to the contestant, his number will be 6,594, and the number of the sitting member 6,542. And if we now leave in or re-add to the general result the votes cast in the township of Boone, in the county of Polk, in the second district, the contestant will still have the largest number of legal votes in the district. The committee, therefore, recommend the adoption of the following resolutions:

1. *Resolved*, That the seven votes cast at Pleasant Grove, with the middle letter of the contestant's name omitted, be allowed and counted for him.
2. *Resolved*, That the vote cast at Kanesville be allowed and counted as a legal vote.
3. *Resolved*, That the vote cast at White Oak be counted and allowed as a legal vote.
4. *Resolved*, That the vote cast at Chariton be allowed and counted as a legal vote.
5. *Resolved*, That the vote cast in Wells township be allowed and counted as a legal vote.
6. *Resolved*, That the vote cast in the township of Boone, in the county of Polk, in the second district, be disallowed and deducted from the votes counted for the first district.
7. *Resolved*, That the votes cast in the county of Dallas by persons proved to have been residing at the time south of the southerly line of Dallas be rejected and disallowed.

The subjoined extracts from the debate in the House will give a fair idea of the arguments presented for and against the report:

Mr. STRONG, of Pennsylvania. In the first place, it was claimed that the White Oak county vote should be rejected, on the ground that the judges of election had not been sworn. This was a matter which did not pertain to the manner of voting, but which had relation merely to the manner of counting the votes. It was perfectly within the power of the House to waive any informality in regard to the return of the votes, although it was not in their power to do so in regard to the manner of voting, without an infringement of the constitutional right of the State of Iowa. The judges of election in that county were not, in point of fact, sworn; and this was the only difficulty. They had returned the number of votes that were given and for whom they were given; but they had not made the return under oath. This, he contended, was a matter which it was perfectly competent for this body to weigh and determine at their discretion, because it was not among the reserved rights of the State, and the practice of this House had always been to count such votes where it appeared that the officers had actually been sworn, although there was no certificate that they had been sworn. The votes of this county were, however, rejected by the committee. In regard to Wells county, he observed that the minority in their report claimed considerable credit for allowing the vote of that county, although an objection existed on the ground of informality. Respecting the vote of the county of Chariton, the same might be said. The fourth point that was raised in the case was, that seven votes given in Marion county were given for Daniel Miller, instead of Daniel F. Miller. In regard to the propriety of admitting them, however, there was no difference of opinion. There was sufficient to designate for whom the votes were cast. And it was a well-settled principle of law that the middle letter was no part of a man's name. In a court of law he might be sued as Daniel Miller.

Three questions then remained for the committee to determine—and they were questions upon which the decision of this case must rest. The first was upon an allegation by the contestant that the votes given in Kanesville must be deemed as part of the votes of Monroe county. Now these were the facts that were shown, and they were not denied; Kanesville was no part of Monroe county proper; it was from one hundred and twenty-five to one hundred and fifty miles from any part of Monroe county. As the eastern portion of the State had been first settled, it had been the practice to attach to the organized counties the few scattering inhabitants residing on lands lying west of such counties for election, reve-

nue, and judicial purposes. Monroe county was one of the border counties, and by act of the legislature the country lying west of it was attached to that county for the purposes he had mentioned. But Kanesville, the place where the majority of the voters lived, was not west of Monroe county, and was never attached to it for any purpose whatever; yet it was claimed that these votes should be counted as a part of the votes of Monroe county. Mr. S. referred to and read from the testimony taken by the committee, to show that Kanesville did not constitute a part of Monroe county, but that if it belonged to any, it belonged to Mahaska county; and contended that these voters ought to have voted in some precinct of the latter county. It being established beyond a doubt that Kanesville, and the country where these voters lived, had never been attached to Monroe county, he asked how it could be claimed that these votes should be counted as part of the votes of Monroe county? The constitution of Iowa required that the votes should be counted only in the county in which the voters resided. These votes therefore, could not be counted with those of Monroe county. He contended further, that the judges of election at Kanesville were not appointed by legal authority, and that the election was held at that place without authority, and being without authority, the commissioners had no power to administer oaths to the judges of election; that the oaths thus administered were extra judicial, and that perjury could not be assigned upon them. The election, then, was not held in the manner prescribed by the State; and unless the constitutional provision upon this point were to be disregarded these votes must be rejected.

He was aware that he should not be able, in the course of the time allotted to him, to discuss these various questions as fully as he would be glad to do; he would pass, therefore, from this question, about which he thought the House could scarcely entertain a doubt, viz., that those persons living at Kanesville had no right to vote in Monroe county or to have their votes counted with those of Monroe county at all, inasmuch as they had never been attached to that county. It was perfectly immaterial whether these voters supposed they had a right to vote in Monroe county or not; the law required that they should vote in the county in which they resided, or to which they were attached. Their right to vote was governed by actual residence, and not by what their supposition might be. But it was said that these persons all resided within the congressional district, and that it was unimportant therefore in what county their votes were counted. This amounted to the very thing against which he was contending. It was an assertion of the power of this house to disregard entirely a constitutional restriction. They could not come to such conclusion without denying virtually to the State of Iowa the power which the Constitution conferred upon her, to fix the place at which the votes should be given. A man who resided at A could not go and vote at B, although it might be within the same congressional district, because it was under a constitutional privilege that he voted at all, and it was important that the provisions of State authority should, in such cases, be carefully observed, for they were the best preservatives against frauds. If a man had a right to vote, his right was known at the place where he resided, but if he might go abroad and vote elsewhere, and among strangers, there would be no means of detecting illegal votes—of discovering whether a man had voted two or three times at the same election, or whether he had voted but once.

But he did not rest his argument upon considerations of policy. He maintained that no man had a right to vote at any other place than in the county in which he resided at the time of the election; and if so, then clearly they could have no right to count his vote anywhere else, no matter whether he voted under a mistake, or whether he voted in the same congressional district or not.

Mr. EVANS, of Maryland, considered nearly all that had been said by Mr. LEFFLER extraneous, not being based upon the evidence, but upon his own knowledge, the statements of the Burlington "Hawkeye" and "Gazette," and other such authority. The gentleman had seen fit to travel out of his way to make a violent attack upon the Mormons, and had declared that they had temporarily stopped in Iowa while upon their way to California. He (Mr. E.) referred to the testimony showing that that people had opened farms, built houses, mills, &c., and had plainly manifested by their actions the *animus manendi*, thus entitling them to vote. He remarked at some length upon the bitterness of feeling exhibited by Mr. LEFFLER against the Mormons, and intimated that it arose from the fact that their votes were at that election cast for the candidate of the whig party, whereas when in Missouri, where they had voted with the democrats, they had been courted by the gentleman's party. He read a letter of Judge Mason, of Iowa, and referred to other evidences to sustain his explanation of the reasons for the course of that gentleman, and for the course, conformable thereto, of a portion of the democratic party in that State.

He proceeded to consider the question of the admissibility of the voters of Kanesville, and took the ground that the evidence was full, entire, conclusive, that they were legal voters in Kanesville, and that they were entitled to vote in Monroe county. He said the report of the gentleman from Pennsylvania [Mr. STRONG] based the argument for the rejection of the Kanesville votes on the ground that Kanesville was not due west from Monroe county, and therefore not entitled to be counted. He referred to the evidence to show that it was the common understanding of that entire county, both whigs and democrats, both residents at Kanesville and in Monroe county, that Kanesville was attacked to Monroe county; that both democrats and whigs did vote there as the lawful place; and he argued that, such

being the case, their votes were legally entitled to be received and canvassed in Monroe county, even if subsequent developments proved that Kanesville was not due west of Monroe. But he contended that there was no evidence that Kanesville was north of west of Monroe—the only evidence relied upon being a survey which the sitting member had caused to be run, and which, having given no notice to the contestant, he (Mr. E.) said could not be received as evidence. He intimated, moreover, that the line was loosely and unscientifically run, and discarded it as in all respects unworthy to be received as evidence. He referred also to the conceded point, that the people of Appanoose county had taken jurisdiction and indicted Gheen for a murder committed at Traders' Point, (which was but eight miles south of Kanesville,) from which judicial determination it necessarily resulted that Kanesville belonged to Monroe county. He contended that one hundred miles of wilderness intervening between Monroe county and Kanesville, the legislature of Iowa could not have intended, nor could it be reasonable, to construe the law with the same strictness with which it would be applied in an old settled county where metes and bounds are fully established, especially when by such technicality they would exclude a large number of citizens from the privilege of the elective franchise.

He maintained the validity of the law which divided Polk county from Boone county on the ground that it was not a separation of a county, and held, as a consequence, that the votes of Boone township, Boone county, should be disallowed in the canvass of Polk county.

Excluding the votes, then, of Boone township, Boone county, from the official canvass, and adding thereto those of Kanesville, White Oak, Chariton, and Wells, the result he arrived at exhibited a majority for the contestant of 59 votes.

Mr. TOOMBS said that all the objections were founded on the presumption that the action of this House is to be controlled by the action of the States. He insisted, however, that all persons qualified to vote for members of the legislature of a State had a constitutional right to vote for representatives in Congress.

There was another point which seemed to lie at the bottom of this whole question. By a law of the State it was provided that a county should embrace within her limits for revenue, election, and judicial purposes all the unorganized country lying west of it. But when, under this law, a line is drawn due west, it had been contended that the citizens lying above or below that line are excluded from the exercise of their elective franchise. He contended that the law merely directed the manner in which the elections should be conducted, but did not destroy the right of the citizen to vote. If the people did not vote in exact conformity to this law their votes were not to be considered at lost. Destroy the vote on this ground and you violate the great republican principle for the sake of a mere technical quibble. He was opposed to the rejection of the vote of any citizen because the voter did not deposit his vote under or over a given line.

Those citizens who reside outside of any regularly organized county have a right to vote in the district, and they may exercise that right anywhere within the district. There may be precincts scattered about throughout the district, and the voter may select to which of those he may be willing to go, and he may cast his vote in any county lying within the district. A State law may prescribe that he shall vote at some particular point, and that he shall vote nowhere else; but these provisions are merely to be regarded as precautions to prevent abuses—they were never intended to destroy votes. They were precautions, and wise precautions, against fraud, but they were never enacted to disturb or abridge the sanctity of the ballot-box. It was not in the power of any law of the State of Iowa to take away the franchise of a citizen of the United States.

The resolution of the committee was rejected, 102 to 94. The resolutions of the minority of the committee, with an additional one giving the seat to the contestant, were rejected by the casting vote of the Speaker. The Speaker was then directed to notify the Governor of Iowa that a vacancy existed in the first congressional district of that State.

NOTE.—The debate will be found in vol. 21 of the Cong. Globe.

The subjoined speeches were—

For the report.		*Against the report.*	
Mr. Strong	pages 1222—1310	Mr. Thompson, of Kentucky	page 1294
McDonald	1294	McGaughey	1299
Harris	1301	Evans	1302
Leoffler	1301	Ashe	1303
Thompson, of Pa	1306	Toombs	1307
		Van Dyke	1308

THIRTY-FIRST CONGRESS, FIRST SESSION.

LITTELL *vs.* ROBBINS, *of Pennsylvania.*

The legal presumption is always against the existence of fraud. Nothing but the most unequivocal evidence can destroy the credit of official returns.

IN THE HOUSE OF REPRESENTATIVES,

AUGUST 19, 1850.

Mr. STRONG, from the Committee of Elections, made the following report:

The fourth congressional district of Pennsylvania is composed of a part of the county of Philadelphia, and embraces within its limits a municipal division called Penn district. The vote of the entire congressional district at the general election in October, A. D. 1848, as officially returned, was as follows:

For John Robbins, jr	6,661
For John S. Littell	6,251
Official majority for John Robbins, jr	410

In the official returns thus made no errors are alleged to have existed, except in Penn district. That district was divided by law into two precincts, denominated east and west. The votes of these two precincts, as returned by the canvassing officers, were—

For John Robbins, jr	924
For John S. Littell	169
Majority for Mr. Robbins	755

This return of the votes given in Penn district is alleged, by Mr. Littell, to be erroneous in the following particulars:

1st. He charges that at the east precinct, in said district, the names of two hundred and sixty-nine persons, who did not vote at all, were fraudulently placed upon the official list, and returned as having voted.

2d. He charges that at the west precinct, in said district, the names of one hundred and sixty-seven persons, who did not vote, were similarly interpolated, and returned as having voted.

3d. He alleges that fifty-one persons voted whose names do not appear on the official lists.

4th. He deduces from the foregoing, that, by deducting the interpolated names mentioned in the first and second specifications, and adding those mentioned in the third, the aggregate vote in Penn district was seven hundred and eight, instead of one thousand and ninety-three, as officially reported.

5th. Of these seven hundred and eight votes, Mr. Littell claims to have received at the east precinct one hundred and ninety-six, and at the west sixty-seven—making in all two hundred and sixty-three, instead of one hundred and sixty-nine, as officially returned; while he alleges Mr. Robbins's vote to have been only four hundred and forty-five, instead of nine hundred and twenty-four, the number shown by the official returns to have been received by him.

It will be perceived, from the above, that the contestant not only claims that there should be deducted from the votes returned as having been given to the sitting member, all those whom he charges to have been interpolated, but also

ninety-four other votes, which he claims were given to him instead of Mr. Robbins.

The foregoing are all the specifications of errors which the contestant has submitted. There are, however, three charges of fraud in the officers who conducted the election in Penn district, which are the following:

6th. The contestant avers that after votes had been polled for him, the officers of the election took from the ballot-box the votes thus polled, and from the official lists of voters an equal number of names, and substituted other votes for the sitting member.

7th. The contestant avers that the officers who conducted the election returned more persons as having voted than the whole number of electors resident within Penn district.

8th. The contestant avers that the official list of those who voted contains the names of some who were non-residents of the district at the time; of some who lived in other districts, counties, and States; and of some deceased.

All these specifications and charges of fraud are traversed by the sitting member.

How far the general allegations of fraud in the officers who conducted the election are sustained by the evidence submitted, we will inquire hereafter. Under a commission issued from the House, numerous witnesses have been examined in support of all the charges of the contestant. Voluminous exhibits have also been made, all which, together with the testimony, is already before the House.

No testimony has been submitted on the part of the sitting member. Preliminary to the examination of the evidence, however, there is an aspect in which this case may be viewed, deserving, we think, of consideration. Mr. Littell avers in his first, second, third, and fourth specifications, that the number of votes cast in Penn district was only seven hundred and eight, while the officers of the election certify that one thousand and ninety-three persons voted. If this averment be admitted as true, the result is that three hundred and eighty-five votes (the difference between 708 and 1,093) were illegally counted and certified. Now, if it be further conceded that all these alleged spurious or illegal votes were counted for Mr. Robbins, and the entire number, three hundred and eighty-five, be deducted from his aggregate, the declared result of the election is not changed. It has already been shown that the official majority of Mr. Robbins was four hundred and ten. If from this be deducted the three hundred and eighty-five votes alleged to be spurious, there still remains a majority of twenty-five.

This result is inevitable, unless the allegation of the contestant in his fifth specification—to wit, that he received more votes than were counted to him—be well founded. It is clearly incumbent upon him to show, not only that three hundred and eighty-five more votes were counted than were actually received, and that they were counted for the sitting member, but also to establish that other votes were given for him than those officially returned, before the right of Mr. Robbins to his seat can be impaired. Of this, however, there is no evidence in the case. Not only is there an utter absence of proof that Mr. Littell received more than the one hundred and sixty-nine votes returned for him in Penn district, but no attempt has been made to support that assertion.

But we proceed to examine the evidence submitted, and inquire how far it sustains any of the allegations of the contestant. It has already been stated that no testimony was taken by the sitting member. That furnished by the contestant reveals the following state of facts: At a "Rough-and-Ready" meeting of the citizens of Penn district, a window committee was appointed to attend the polls at the election in October, 1848. That committee undertook to keep a list of the persons voting at the east precinct. That list was kept on the outside of the window at which the electors voted, while the officers who

conducted the election were stationed within. At the east precinct there wer in the hands of this committee two printed lists of those who were registered as voters in the district, and an attempt was made to keep an account be "ticking," or marking with a lead pencil, the name of each person as his vote was received. These lists were duplicates, though the evidence shows that no attempt was made to keep both lists during the entire day. At times the marking was made upon both, at other times upon one, and at still other times on the other list. Five different persons seem to have been employed at intervals in keeping these lists. After the close of the polls, the marked names were counted, and they were found to be, at that precinct, two hundred and sixty-nine less in number than the number which the official lists, kept by the officers of the election, showed to have voted. At the west precinct a similar course was pursued, with these differences—that the lists were kept alternately by two persons; that they had no printed list of voters, but endeavored to write the name of the elector as he deposited his vote, and kept their account in part upon separate pieces of paper, which were subsequently attached to each other. By a count of the names thus written, after the close of the polls it was ascertained that these two outside observers had upon their list one hundred and sixty-seven names less than were entered upon the record kept by the officers of the election. Such (with the exception of the testimony of a single witness hereafter to be noticed) is the evidence upon which the contestant relies to sustain his allegations that more votes were counted and certified than were actually received. It is obvious that the credit to be attached to this testimony is entirely dependent upon the accuracy with which these outside lists were kept. In the absence of anything to rebut it, the presumption must be in favor of the correctness of the record kept by the officers of the election, and of their return. "Fraud is not to be presumed," is a maxim not only of law but of common justice. The means of knowledge, the facilities for accuracy, the impossibility of inattention, and the responsibilities connected with the failure to discharge their duty, all unite to secure a credence to the acts of the officers, which cannot be justly accorded to the acts of others, especially if those others be mere partisans. But, in addition to this, the laws of Pennsylvania are such as to guard most effectually against the perpetration of such frauds as are charged in the memorial of the contestant. They are such, indeed, as to render fraud impossible, unless with the connivance of all the officers whose duty it is to conduct the election. The statutes of that State require at each poll the presence of one judge, two inspectors, two clerks, and one assessor, to receive the votes, to record the names of the voters, to ascertain and to certify the result. These officers are required to be sworn, before entering upon their duties, faithfully to conduct the election, to guard against fraud, and to make true returns. During the progress of the election, the judge has only to decide upon the qualifications of persons offering to vote in those cases in which the inspectors disagree. Both the inspectors receive the vote from the elector as he presents himself, calling his name aloud to the clerks, who each records it. The assessor is required to be present with the lists of registered voters, that reference may be made to them if the inspectors doubt the qualification of any person who offers to vote. Other sections of the same statute impose severe penalties upon any officer who may be guilty of fraud, or any delinquency in the discharge of his official duty. When the election is closed, the boxes in which the ballots have been deposited are opened in the presence of all the officers, each ticket is read aloud by each of the inspectors, and entered by both clerks on the tally list. When the counting is completed, the result is publicly proclaimed, and a certificate made out and signed by the judge and the inspectors. It is obvious, therefore, that fraud is impossible, except there be a corrupt combination of all the officers of the election; and mistake is hardly practicable. We have referred to these

provisions of the statutes of Pennsylvania for the double purpose of rendering more intelligible to those who are not familiar with the mode of conducting elections in that State the testimony submitted, and of calling attention to the fact that at the two precincts in Penn district the election was conducted and the returns made under the sanction of the oaths of the officers of the election. Two judges, four inspectors, and four clerks—ten officers in all—conducted the election in these precincts, made out the returns, and certified them as correct, under the obligation of an oath. Not only the legal presumption, therefore, which is ever against the existence of fraud, and in support of the acts of public functionaries, but that stronger presumption which arises from the oaths of public agents acting in view of the most stringent obligations, must be considered as supporting the return of the officers in Penn district. It would be both unjust and dangerous in the extreme to permit anything less than the most credible, positive, and unequivocal evidence to destroy the credit of official returns thus made. It is not sufficient to cast suspicion upon them; they must be proved fraudulent.

We have found no evidence of such a character in that which has been submitted to us. The witnesses respecting the conduct at the election at the east precinct, with a single exception, (to be noticed hereafter,) were all active partisans, who attended the election and attempted to keep lists of the voters, acting under no other obligation than that which results from fidelity to party; and even their testimony proves the lists kept by them to be inaccurate and incomplete.

The report examines at length the evidence, coming to the conclusion that there was no testimony "destroying the presumption both of law and fact that the votes given in the east precinct of Penn district were as officially returned." The specific allegations of the contestant, they believe, were not sustained. The report concludes as follows:

We have only to add, that a large part of the testimony and exhibits offered by the contestant, and submitted with this report, is in our opinion entirely irrelevant and inadmissible. It relates exclusively to the conduct of the presidential election held in November, A. D. 1848, and not to the October election, when the representative to this house was chosen. We are unable to perceive that it sheds any light upon the question here to be adjudicated. Nor can we regard those exhibits, which are the mere results of comparisons made by the witnesses, legitimate evidence. They would be inadmissible in any court of law, and are, in our opinion, entitled to no weight here. They have, however, been returned by the commissioner, and have been printed with the testimony. It is for the House to distinguish that which is legal from that which is not.

We submit the following resolution:

Resolved, That the Hon. John Robbins, jr., is entitled to the seat which he holds in this house as the representative from the fourth congressional district of Pennsylvania.

The House (September 11, 1850) agreed to the report without a division.

NOTE.—The speech of Mr. Strong in support of the report will be found in Congressional Globe, vol. 21, part 2, page 1795; that of Mr. Van Dyke, against report, same volume, page 1779.

THIRTY-FIRST CONGRESS, SECOND SESSION.

JARED PERKINS, *of New Hampshire.*

The delegation in the House from New Hampshire was elected under an act of the legislature districting the State in 1846. In July, 1850, the State was again districted. Shortly after a special election was held to fill a vacancy in the third district, and George W. Morrison was elected under the new districting act, though the other members of the delegation held their seats under the previous act. The committee held that the election was properly held in the towns denominated the "third district," under the act of July, 1850.

IN THE HOUSE OF REPRESENTATIVES.

DECEMBER 16, 1850.

Mr. STRONG, from the Committee of Elections, made the following report:

In this case no facts are in dispute; those which are material to the correct adjudication of the question are admitted alike by the contestant and the sitting member. They are the following: By the act of Congress of June 25, 1842, it was enacted that, from and after the third day of March, A. D. 1843, the House of Representatives should be composed of members elected agreeably to a ratio of one representative for each seventy thousand six hundred and eighty persons in each State, and of one additional representative for each State having a fraction greater than one moiety of the said ratio, computed according to the rule prescribed by the Constitution of the United States. According to this ratio, the people of the State of New Hampshire are entitled to four representatives. The second section of the same act of Congress provides "that in every case where a State is entitled to more than one representative, the number to which each State is entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of representatives to which said State may be entitled, no one district electing more than one representative." In pursuance of this apportionment, and in compliance with the provisions of this act of Congress, the legislature of the State of New Hampshire, by their act, approved on the second day of July, A. D. 1846, divided the State into four congressional districts, and enacted that the counties of Rockingham and Strafford should constitute the first district; the counties of Merrimack, Belknap, and Carrol should constitute the second; the counties of Hillsborough and Cheshire should constitute the third; and the counties of Sullivan, Grafton, and Coos should constitute the fourth district. The same act prescribed, in subsequent sections, the time and manner of holding congressional elections, of making returns of the votes, and of ascertaining the result. On the second Tuesday of March, A. D. 1849, elections were held in the four districts into which the State had been divided, and the Hon. Charles H. Peaslee was duly elected in the second district, and the Hon. James Wilson was elected in the third district, then composed of the counties of Hillsborough and Cheshire; and each of those gentlemen took a seat in the House of Representatives of the 31st Congress.

On the eleventh day of July, A. D. 1850, the legislature of New Hampshire, by their act approved on that day, redistricted the State for congressional elections, and enacted that the counties of Rockingham and Strafford, and the towns of Wakefield, Brookfield, Wolfborough, and Tuftonborough, in the county of Carrol, should constitute the first district; the county of Merrimack, (excepting the towns of Bow, Dunbarton, Hopkinton, and Henniker,) the county of Belknap, the remaining towns in the county of Carrol, and the towns of Hill, Bristol, Bridgewater, and Holderness, in the county of Grafton, should constitute the second district; the counties of Hillsborough and Cheshire, and the towns of

Bow, Dunbarton, Hopkinton and Henniker, in the county of Merrimack, should constitute the third district; and the counties of Sullivan and Coos, and the remaining towns in the county of Grafton, should constitute the fourth district. The second section of the act repealed so much of the act of the legislature of July 2, 1846, as was inconsistent with the provisions of this act, and declared that the act of July 11, 1850, should go into effect from its passage.

On the ninth day of September last, (1850,) the Hon. James Wilson, who had been elected on the second Tuesday of March, A. D. 1849, by the third district as then constituted, resigned his seat in the House of Representatives. A vacancy having thus occurred, the governor of New Hampshire issued a precept for an election to be held on the 8th day of October, 1850, to fill the vacancy that had thus been made. This precept was directed to the district as constituted by the act of the legislature of the State, of July 11, 1850. In accordance with the precept thus issued, an election was held, and George W. Morrison received a majority of sixty-three votes over the contestant and all others. If, however, the votes given in the four towns of Merrimack county, (Bow, Dunbarton, Hopkinton, and Henniker,) which, by the act of July 11, 1850, were made a part of the third district, be rejected, then the contestant received a majority of two hundred and forty-seven votes. The memorialist contends that the votes given in those four towns cannot properly be counted, and that only the electors resident in the district as constituted by the act of July 2, 1846, could legally and constitutionally vote at the special election. This position is controverted by the sitting member, and thus is presented the only issue in the case.

In view of the facts thus exhibited, your committee are of opinion that the claim of the contestant is invalid, and that he is not entitled to the seat which he contests.

By the Constitution of the United States, the right to prescribe the times, places, and manner of holding elections for representatives in each State is declared to be in the legislature thereof, subject to the superior power of Congress to make or alter such regulations by law. That power, however, Congress has never exercised, unless it was partially exerted by the second section of the act of June 25, 1842, to which reference has already been made. Limited only, therefore, by the provisions of that section, the legislature of New Hampshire had plenary power to prescribe by what districts the elections should be made, and to change the boundaries of those districts at its pleasure, and at any time. No constitutional provision, no law of Congress, restrains this right originally to form, or subsequently to alter, the limits of congressional districts, at the discretion of the State legislature. It is conceded that Congress could by law have exclusively determined the extent of each district, and enacted that it should remain unchanged, under the apportionment, during the entire period of ten years. But this has not been done. The act of June 25, 1842, only enacted that the elections (alike general and special) should be by districts of contiguous territory; and, under the law, the limits of each district must be as they were before its passage—such as the legislature of the State may from time to time prescribe. The act of Congress is merely commendatory. It was not possible to delegate to the State legislature the legislative power vested by the Constitution in Congress. It follows, of course, that the districting acts are the untrammelled action of the legislative assembly of New Hampshire, and consequently that the power to change the boundaries of a district remains unlimited in the same legislature. Your committee are not informed that this position has hitherto ever been seriously controverted. Such appears to have been the common understanding. The legislatures of several of the States, after having formed congressional districts in conformity with the recommendation of the act of Congress of June 25, 1842, have subsequently redistricted the States, or made changes in the boundaries of the districts previously formed. No

Carolina, Georgia, Ohio, and Pennsylvania are among the number. Representatives elected from the districts thus reorganized have been admitted to seats in the House without objection. More than twenty representatives elected by these remodelled districts sit unchallenged in the present Congress.

But it is urged, on behalf of the contestant, that if the power be conceded to the legislature of New Hampshire to redistrict the State, the districting act of July 11, 1850, does not extend to an election to fill vacancies in the 31st Congress. In terms, however, it unquestionably does. It took effect from its passage. It repealed so much of the former act as was inconsistent with its provisions. Immediately on its passage, therefore there were no congressional districts in New Hampshire, other than those limited by this later act. An election to fill the vacancy occasioned by the resignation of Mr. Wilson could, therefore, have been held in no other manner than that in which the sitting member was elected. The third district, by which Mr. Wilson was elected, was a creature of the act of July 2, 1846; it was sustained by it and ceased with it. When, therefore, an election was ordered to be held on the 8th of October, 1850, no political division, no congressional district, embracing exclusively the counties of Hillsborough and Cheshire, had any legal existence. It had given place to the third district, as limited by the second districting act. The governor of the State coud issue his precept to none other than an existing district. Had the precept been sent to the counties of Hillsborough and Cheshire alone, it would have been sent to a political nonentity.

But the contestant denies the power of the legislature to extend the provisions of the second districting act to the supply of a vacancy in the representation in the 31st Congress. What limited their power? If they did not possess it, some provision of the Constitution or act of Congress must have denied its existence or restrained its exercise. No such provision is shown, and none is known to your committee. As has already been remarked, the division of a State into congressional districts is but a regulation of the manner in which elections shall be held. This power to prescribe the manner is distinctly declared in the Constitution of the United States to belong to the State legislatures, subject to the control of Congress. No clause in that Constitution declares the power to be exhausted when once exercised. No case is excluded from its operation. It extends alike to general and to special elections. Its exercise may be repealed at the discretion of the State legislature.

Let it be supposed that all the members of the New Hampshire delegation had resigned contemporaneously with Mr. Wilson. Can it be asserted that elections to fill the vacancies must have been held in the districts as constituted by the second districting act? If it be conced that they must have been so made, then the power of the legislature to extend the provisions of the act to the supply of a vacancy is admitted, and also the fact that the provisions did thus extend.

It is important to distinguish between the existence of the power and the propreity of its exercise. The policy of changing the boundaries of congressional districts after they have once been united may well be questioned. But the House, in judging of the elections of its members, has only to inquire what the law is—not what, in their opinion, it should be. No judicial tribunal may go behind the law. In adjudicating upon any case of a contested election, the House can only determine whether such election has been held in accordance with existing legal provisions; whether the qualifications of the person elected are such as the Constitution requires, and whether the returns have been legally made. If the legislature of New Hampshire had power to rearrange the congessional districts in that State at the time when they passed the act of July 11, 1850, if no constitutional obstacle existed to the passage of that act, then this House can look no further. It would transcend its legitimate province if it at-

tempted to inquire whether the action of the New Hampshire legislature had been just or discreet.

The argument of the contestant is based almost entirely upon the supposed injustice and inequality of the second districting act of the State. He rests his claim not upon any provision of the Constitution or law, but upon the alleged anomaly that because the electors resident in the towns of Bow, Dunbarton, Hopkinton and Henniker were in the second district at the time when the honorable Charles H. Peaslee was elected, if they be permitted to vote in the third district at the special election, they will be doubly represented and have two representatives in the thirty-first Congress. Waiving the consideration that this is wholly immaterial to the inquiry as to what the law is, and of course to the proper adjudication of the question, it may be observed that the instant these four towns were severed from the second district and united to the third, the inhabitants ceased to be represented by Mr. Peaslee, even in the sense in which the phrase is used by the contestant, and were represented by Mr. Wilson. But the argument of the contestant is founded upon an erroneous view of the theory of constitutional representation. The extent of the trust is not measured by the number of those who were the agents in the selection of the representative. The Constitution uniformly speaks of the members of the House as representatives chosen by the people of the several States. No matter how or by whom elected, no matter how limited may be the elective franchise, each is the representative of the entire people of a State, and not the less so because only a part of the people participated immediately in his election. True, they are elected by districts, but the division of a State into districts is a regulation of the manner of the election, and not of the extent of representation. The district is a political division, formed solely for the purpose of election; it is a territorial division. While its limits remain fixed, its inhabitants may change. That electors who voted in the second district in March, 1849, voted also in the third in October, 1840, is no unusual occurrence. Had the second districting act never been passed, the same thing might have happened by the removal of electors from one district to the other. In that case, as now, they would have voted for two members of the same Congress.

So it may occur, and often does, that an elector, after having voted in one State for a representative to this house, removes to another, acquires citizenship, and votes for a second representative in the same Congress. In the State of Virginia, freeholders in two congressional districts may vote, upon the same day, for a representative in each district. If this objection urged against receiving the votes given in the four towns made part of the third district by the act of July 11, 1850, be valied, it is equally available against the reception of votes from electors who have changed their residence, and those in Virginia who have already voted in one district. There is, however, no constitutional or legal provision which prohibits such voting, and your committee are not informed that even its propriety has ever been assailed. This has properly been left to the discretion of the people of the several States. It certainly should not influence the House while sitting as a judicial tribunal.

In the discussion of this case before your committee, one other and only one other argument was submitted by the contestant. It was, that if the legislature of New Hampshire could change the boundaries of the district, they might have so divided it as to render it impossible to determine to which district the governor's precept should have been sent. This may be admitted, but it does not disprove the existence of the power. It is certainly illogical to argue that because a power may be abused, therefore it does not exist. A deed or a will may be so uncertain in its provisions as to be void; but who would argue from this that the grantor or testator had not the power to make a deed or a will? In this case no such uncertainty exists. As already observed, the election

must have been held as it was, or there could have been no supply of the vacancy.

Upon a review of the whole case, therefore, your committee recommend the adoption of the following resolution:

Resolved, That George W. Morrison is entitled to the seat which he holds as a representative from the third congressional district of New Hampshire.

JANUARY 3, 1851.

Mr. MCGAUGHEY, on the part of the minority of the Committee of Elections made the following report:

The material facts in this case have been agreed upon by the parties, and are so fully set forth in the report referred to that a restatement of them at length is deemed to be unnecessary.

If the people inhabiting the territorial limits of the district represented by Hon. James Wilson have the right to fill the vacancy occasioned by his resignation, then the memorialist, Jared Perkins, is entitled to the seat which he claims, having received a majority of 243 votes over all other candidates at the late election, within those limits.

But if the people inhabiting the territorial limits of the district called number three by the act of July 11, 1850, are entitled to fill the vacancy, then George W. Morrison is entitled to the seat which he occupies, having received 63 votes over all others within those limits at the late election.

It is the opinion of the undersigned that the vacancy occasioned by General Wilson's resignation can be filled only by the people of the territory he represented; all other people of New Hampshire continued to be represented after his resignation as before, and were affected by his resignation in no other way than the people of another State might be; consequently they can justly claim neither to fill the place which he occupied, nor to cast in their votes with the votes of the people of that district so as to decide who shall represent them.

The act of June, 1846, districting the State of New Hampshire, was the first compliance by that State with the law of Congress of 1842, requiring representatives to be chosen by districts. General Wilson was, on the second Tuesday of March, 1849, elected by the third district thus constituted, as a member of the 31st Congress. The act of 1846 was repealed by the act of July 11, 1850, so far as the same was inconsistent with the provisions of this last act, making new districts.

We do not believe that a just construction of the act of July last will show that act to be in conflict with the claim of the memorialist. It does not purport to provide for any method of filling vacancies that might occur in future, and beyond all question it was understood as providing only for the election of members of future Congresses. Such are the terms of the act, and such must also be its spirit.

A vacancy in the House of Representatives is the occurrence of an event by which a portion of the people are left unrepresented, and the filling of that vacancy is directed by the Constitution in such explicit language as requires no aid from State enactments to perfect the right. The second section of the first article in the Constitution contains the following provision:

When vacancies occur in the representation from any State, the executive authority thereof shall issue writs of election to fill such vacancies.

This is the only provision of law on the subject of vacancies, and it is ample and sufficient. No act of the legislature of New Hampshire purports to interfere in the matter, and the act of July ought not, in our belief, to be understood as requiring the vacancy occasioned by General Wilson's resignation to be filled by any other people than those whose representative he was.

Had such been the purpose of the act, we believe it was incompetent for the law-making power of that State to accomplish the object, while this house hold the right to judge of the elections of its members. It would not be a preservation of the purity of the elective franchise, nor would it be a just guardianship of the republican principle, that all have a right to be represented, to admit the power of a State legislature to provide that a portion of the people should have two representatives in Congress, while another portion should have none, or not be represented by the man of their choice.

If the sitting member is allowed to hold his seat, it is by virtue of the votes of Bow, Dunbarton, Henniker, and Hopkinton, which decide the election in his favor, against the contestant, who had a majority of votes in the remainder of the district—being the district which elected General Wilson. The people of these towns participated in the election of the Hon. C. H. Peaslee, whose representative he now is, upon the floor of this house; and to permit them to turn the scale by their votes in favor of the sitting member, is to admit a double representation, which is unreasonable and unjust. It is, besides, in disregard of the law of Congress of June, 1842, which declares that no one district shall be entitled to two representatives.

If the people who choose a representative are not entitled to fill the vacancy happening by his resignation, it is impossible to tell what portion of the population may most properly exercise this privilege. It seems to be assumed in this case that the new district made by the act of July 11, 1850, and numbered three, has the right to send a representative in place of General Wilson, because the number corresponds with that which General Wilson represented. But the order of numbering is an unimportant circumstance, and the first or the fourth district might have been as properly called the third as any other; yet it would be a strange assertion, that on this account such district would be authorized to have two representatives during the remainder of the 31st Congress.

But if it be said that General Wilson's old district ought to make a part of the new, in order to give the new district, numbered three, the right to send his successor, it may be asked which half of his district would be authorized to partake in the choice, suppose the old district had been divided into two nearly equal parts by the new division, and neither of the parts been in the district numbered three.

Several of the subscribers believe that when a State has once complied with the act of Congress of 1842, directing the choice of members by districts, it is not competent for the States to redistrict till after another census. Although we are not unanimous in this opinion, we agree in recommending the adoption of the following resolution:

Resolved, That Jared Perkins is entitled to the seat claimed by him, as the representative to fill the vacancy occasioned by the resignation of James Wilson.

JOHN VAN DYKE.
J. B. THOMPSON.
G. R. ANDREWS.
E. W. McGAUGHEY.

The House adopted the report of the committee, 98 to 90, and Mr. Morrison retained his seat.

The debate was confined to the points argued in the reports.

NOTE.—In the debate the following gentlemen spoke:
In support of the report: Mr. Strong—vol. 23, Cong. Globe, page 183; Mr. Woodward, page 189; Mr. Disney, page 193; Mr. Hibbard, page 194; Mr. McLane, page 199; Mr. Harris, page 201; against: Mr. Thompson, of Ky., page 185; Mr. Van Dyke, page 197; Mr. Schenck, page 205.

THIRTY-FIRST CONGRESS, SECOND SESSION.

W. S. MESSERVY, *of New Mexico.*

The claimant was sent to Washington by certain inhabitants of New Mexico to represent them in Congress before the Territory was organized. Held by the committee that his claim should be rejected. The case was not acted on in the House.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 6, 1851.

Mr. STRONG, from the Committee of Elections, made the following report:

By the treaty of Guadalupe Hidalgo, which transferred to the United States the sovereignty of the country now known as the Territory of New Mexico, the political organization which had previously existed there was extinguished, and the inhabitants were left without any form of government recognized by our Constitution and laws. It was, doubtless, supposed that Congress would, without delay, organize there a territorial government, of a similar character with those which have heretofore been formed for other portions of our unorganized territory. Owing to causes to which it is unnecessary now to refer, this expected action of Congress was long delayed, and the resident population of the country were left to suffer all the evils and embarrassments which attend a disorganized state of society and the absence of a regular government. Tired of waiting for the unsolicited action of Congress, and with a view to remedy these evils, a large number of the citizens assembled at Santa Fé, on the 21st day of August, A. D. 1849, to consult upon the propriety of organizing a suitable territorial government. At this meeting it was resolved to recommend to the inhabitants of the country the election of delegates to a general convention, the object of which should be "to concert such plans and adopt such measures as might be most effectual for the attainment of good civil government." In furtherance of this resolution, (as has heretofore been stated by your committee in a former report,) Lieutenant Colonel B. L. Beall, then the acting military commandant at Santa Fé, issued a proclamation to the citizens of New Mexico, recommending to them to assemble in mass meetings in their different counties, and at designated places, on the 10th day of September, 1849, for the purpose of electing delegates to a general convention to be held at Santa Fé on the 24th day of September then next ensuing. The proclamation averred the object of the convention to be "the concert of such plans and the adoption of such measures as might be most effectual to the attainment of a good civil government, and the appointment of a delegate to go to Washington to enforce its suggestions and to urge the early action of Congress in its behalf." In conformity with the recommendations of this proclamation, elections were held, and the persons elected met in convention at Santa Fé on the 24th day of September, A. D. 1849, and on the same day elected Hugh N. Smith, esq., to be a delegate to represent the interests of the Territory of New Mexico in the Congress of the United States. The convention then proceeded to prepare a plan to be submitted to Congress, as the basis upon which they desired the civil government of New Mexico to be formed, and forwarded the same by Mr. Smith, with instructions to urge upon Congress to give to the country a territorial government, embracing the provisions contained in the plan by them recommended. Mr. Smith received a commission as a delegate, signed by the president of the convention, and attested by its secretary. Thus elected and instructed, and with this commission, Mr. Smith presented himself at the first session of this Congress, and asked to be admitted to a seat as a delegate.

The House, however, on the 19th day of July, A. D. 1850, refused to accord to him the seat which he claimed. While these proceedings were pending, and long before any decision upon the application of Mr. Smith had been made, on the 25th day of May, A. D. 1850, another convention was assembled at Santa Fé. This convention formed a constitution for a *State* government. The preamble of the constitution declares that the people of New Mexico did "ordain and establish the following constitution," and did mutually agree with each other to form themselves into a free and independent State, named New Mexico. The tenth section of the schedule attached to this constitution provided that the military and civil governor of the Territory should be requested, immediately on the adjournment of the convention, to issue writs of election to the prefects of the several counties, requiring them to cause an election to be held on the 20th day of June, A. D. 1850; the electors to vote for or against this constitution, for a governor and lieutenant governor, a representative in the Congress of the United States, and senators and representatives to the legislature. The same section of the schedule made provision for the manner in which the votes should be counted, and directed that the returns should be forwarded to the secretary of the Territory, who should transmit them to the legislature on the first day of their session. The eleventh section of the schedule directed that the governor elect, or the lieutenant governor acting as such, should certify the returns of votes for or against the adoption of the constitution, and should send them to the Secretary of State of the United States within thirty days from the day of election. The twelfth section is as follows:

It shall be, and is hereby made, the duty of the governor, or lieutenant governor acting as such, if it appears from the returns of the votes for and against this constitution that it has been adopted by the people, immediately to cause a fair copy of the same, together with a fair digest of the votes given for and against the constitution, to be forwarded to the President of the United States, to be laid before the Congress of the United States.

On the 28th day of May, A. D, 1850, John Munroe, styling himself "civil and military governor of the Territory of New Mexico," issued his proclamation, (a copy of which is appended to this report,) reciting the proceedings of the convention and directing an election to be held in accordance with the provisions of the tenth section of the schedule of the constitution, on the 20th day of June, A. D. 1850. The proclamation contained the following proviso: "It being provided and understood that the election of all officers in this election can only be valid by the adoption of the constitution by the people, and otherwise null and void; and that all action of the governor, lieutenant governor, and of the legislature, shall remain inoperative until New Mexico be admitted as a State under said constitution, except such acts as may be necessary for the primary steps of organization and the presentation of said constitution properly before the Congress of the United States. The present government shall remain in full force until by the action of Congress another shall be substituted."

An election was accordingly held, and six thousand seven hundred and seventy-one votes were given in favor of, and thirty-nine votes against, the adoption of the constitution. At the same time Henry Connelly was elected governor, Manuel Alvarez lieutenant governor, and William S. Messervy a representative in Congress, he having received four thousand nine hundred and thirty-four votes, and Hugh N. Smith three thousand four hundred and seventy-four votes, for that office. The legislature met and elected two persons to represent the State in the Senate of the United States.

Thus elected, Mr. Messervy claims to be admitted to a seat in the House of Representatives, as a delegate from the Territory of New Mexico, on the same footing with the delegates from the Territories heretofore organized under the laws of the United States. He presents the following as his credentials:

UNITED STATES OF AMERICA,
State of New Mexico.

I, Manuel Alvarez, governor of the State of New Mexico, do hereby certify that William S. Messervy was, on the 20th day of June, A. D. eighteen hundred and fifty, duly elected by the qualified voters of the State of New Mexico to represent said State in the thirty-first Congress of the United States.

In testimony whereof, I have hereunto set my hand, and affixed my private seal, there being no seal for the State. Done in the city of Santa Fé, this ninth day of July, [L. S.] A. D. eighteen hundred and fifty.

MANUEL ALVAREZ.

By the governor:

LEWIS D. SHEETZ, *Secretary of State.*

A similar certificate is also presented, signed by a certain Donaciano Vigil who calls himself secretary of the Territory of New Mexico.

The foregoing are all the facts which relate to the application of Mr. Messervy, and in the opinion of your committee they show not merely that he has no rightful claim to the seat which he asks, but that it would be highly inexpedient to admit him.

It may be observed that the application for admission as a *territorial* delegate is directly in conflict with Mr. Messervy's credentials. It is an attempt to change the character in which he was sent. The constituency which elected him sought to obtain a State, not a territorial form of government. In transmitting their constitution they sought for the admission of New Mexico into the Union as a State, and for the reception of Mr. Messervy as the constitutional representative of the people of a State in the Union. By no action of theirs did they authorize him to act in an inferior or any other capacity than as such a representative. Nothing which they have done can be construed into the expression of a desire that the person whom they sent should sit on the floor of the House until the admission of New Mexico into the Union. On the contrary, it may fairly be inferred that the choice which they made of a State form of government negatives the wish to have merely a territorial delegate here. It is not easy to perceive how the House can with any propriety aid the applicant thus to throw off the authority conferred upon him by the people who sent him, and assume another with which he was never invested.

But leaving this consideration, and conceding for the present that he was elected and sent to act as a territorial delegate, your committee are of opinion that his admission would be impolitic, and a dangerous precedent. It would be a departure from all the established usages of the government. It need not be said that the House of Representatives is now and ever has been composed exclusively of members elected under the Constitution and laws of the United States, and in accordance with the provisions of that Constitution and those laws. During its entire existence of more than sixty years no person elected in any other mode, or sent from any constituency unknown to the Constitution and laws, has been admitted to a seat. Territorial delegates have indeed been admitted, and it is true that they are not mentioned in the Constitution. But they have in every instance been admitted under an unvarying rule. In every case the delegate has been chosen under laws enacted by Congress, and from a Territorial government subordinate to and emanating from the Constitution and laws of the United States. The celebrated ordinance of July 13, 1787, made the first provision for the election and admission of a territorial delegate. It provided that the legislature of the Territory northwest of the Ohio might elect by joint ballot a delegate to Congress, who should have a seat in the House of Representatives during the existence of the territorial government, with the privilege of debating, though not of voting. That ordinance was contemporaneous in its passage with the formation of the federal Constitution, and was recognized by it. It was also affirmed by an act of the first Congress, and a ...ate t... ...d was permitted to hold his seat. In accordance with this

precedent, as other territorial governments have been formed, and became entitled under their organic law to legislative assemblies, Congress has uniformly provided by law for the election of a delegate with similar privileges. In some instances the law has provided that the delegate should be elected by the territorial legislature, and in others by the people included under the government. But in every case the delegate admitted has been chosen under laws previously enacted by Congress, and from a government subordinate to and emanating from the Constitution and laws of the United Sta ts. So uniform has been this usage, and so well understood, that by the act of Congress o March 3, A. D. 1817, the term of office and the privileges of such delegates were expressly defined. That act, however, speaks only of delegates from temporary governments then established, or which might thereafter be created, and which were or might be thereafter authorized by act of Congress to send delegates. No provision was made for any other. It was not contemplated that there could be any other. It may, therefore, safely be averred that the basis upon which rests the admission of a territorial delegate, if not constitutional, is fundamental. There have been political organizations in parts of the unorganized territory of the United States, but none such have been permitted to enjoy representation here. The case of Almon W. Babbitt, who claimed to be admitted as a delegate from Deseret during the last session of this Congress, is in most respects similar to this. In that case a State government had been formed, and Mr. Babbitt had been elected by the legislature, but this house refused to admit him to a seat. The case of Hugh N. Smith, already mentioned, affords another instance of the adherence of the House to the unbroken usage of past years. If it be regarded as a question of expediency, both his case and Mr. Babbitt's in many aspects presented stronger claims than the one now under consideration. The one was elected by a convention—the other by the people in mass. In both these cases, appealing strongly, as they did, to the discretion of the House, no departure was permitted from former practice. Precedents so numerous, usage so unbroken, extending through all our past history, should have controlling influence in the exercise of the discretion of the House. Unlike all who have been admitted as territorial delegates, Mr. Messervy founds his application upon neither the Constitution nor laws of the United States. His election was not subordinate to, but in disregard of them—in hostility even to the territorial government subsequently formed by Congress.

The argument in favor of the applicant is, that the resident population of New Mexico should be represented. As already observed, it is neither the theory nor the practice of our government that any individuals living under no political organization should enjoy either complete or partial representation. The admission of such a principle would be eminently dangerous. Your committee, however, do not propose to discuss the evils which would inevitably follow the establishment of such a precedent. They have already done this in a report heretofore submitted to the House, which received its sanction. It should, however, be remembered that the supposed necessity which was averred to exist in the case of Mr. Babbitt and Mr. Smith has no existence in this case. Provision has already been made by law for a territorial delegate. The act of Congress of September 9, A. D. 1850, provided for the establishment of a territorial government over New Mexico. The fourteenth section of that act authorized the election of a territorial delegate, and provided that the first election should be held at such time and places, and be conducted in such manner, as the territorial governor should appoint and direct, and that at all subsequent elections the times, manner, and places should be prescribed by law. True, the provisions of that act were suspended until the boundary between the United States and the State of Texas should be adjusted; but that boundary having been determined, the act is now in force. There is, therefore, at this day provision made by law for territorial representation of New Mexico. It necessa-

rily negatives both the legality and expediency of any other. Mr. Messervy has no pretensions to having been elected under this organic law; but, on the contrary, his credentials are in antagonism to it. Were he admitted to the seat which he claims, there would be no legal impediment to the admission of another delegate from the Territory of New Mexico. It may be, indeed, that no such delegate will appear during this Congress; and should such be the case, your committee are unable to perceive that any serious evils would result either to New Mexico or to the country at large. Certainly no such overruling necessity is shown to exist as should induce the House to disregard a uniform usage of more than sixty years, and establish a precedent which may lead to unending confusion in the future.

Your committee unanimously recommend the adoption of the following resolution:

Resolved, That William S. Messervy, esq., be not admitted to a seat in the House as a delegate from the Territory of New Mexico.

The case was not acted upon in the House.

THIRTY-SECOND CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. DISNEY, Ohio.
ASHE, North Carolina.
WILLIAMS, Tennessee.
HAMILTON, Maryland.
SCHERMERHORN, New York.
Mr. CASKIE, Virginia.
EWING, Kentucky.
DAVIS, Massachusetts.
GAMBLE, Pennsylvania.

WRIGHT *vs.* FULLER, *of Pennsylvania.*

The intent of the law, requiring notice to be given specifying the particular grounds of the contest, was to prevent any surprise being practiced upon the sitting member, and to put him upon a proper defence. It is not necessary to furnish the incumbent with a list of alleged illegal voters.

A contestant can take evidence touching the qualifications, duties and acts, and conduct of officers conducting an election.

The House is compelled, when adjudicating in any matter affecting the elections, returns, or qualifications of any of its members, to make the law of the respective States, from which such members may be returned, its rule of action.

A judge of an election cannot usurp the duties of an inspector.

The House laid the whole subject upon the table.

IN HOUSE OF REPRESENTATIVES,

APRIL 22, 1852.

Mr. ASHE, from the Committee of Elections, made the following report:

The petition of the contestant, with all of the accompanying papers, was referred to the committee on the 10th of December last, since which time the committee have been most assiduously employed in the examination of the testimony taken in this case under the provisions of the act of last Congress, regulating the mode and manner of taking evidence in contested elections, and in hearing arguments from both parties on the merits of the case. The sitting member produced before the committee regularly authenticated returns from the different election precincts composing the 11th district, which, summed up, give

he sitting member 6,216, and the contestant 6,157, leaving in favor of the sitting member a majority of 59 votes. The contestant, considering himself aggrieved by the mode and manner in which the election in the Danville precincts, in the county of Montour, was conducted, (the returns of which are 32 for contestant and 659 for sitting member,) served, within the time prescribed by law, a notice on the sitting member of his intention to contest his seat. The sitting member admitted the service of the notice, and, as empowered by the last clause of 1st section of the above act, gave due information to the contestant "of the other ground upon which he rested the validity of his election." As the sitting member raised before the committee an objection that the contestant's notice was insufficient—not being in compliance with the requirement of the act of Congress—the committee have thought it but proper to transcribe the notice in full, so that the House might be enabled to determine what weight should be given to the objection:

To Henry M. Fuller, esq., returned as member elect to the thirty-second Congress of the United States, from the eleventh congressional district of the State of Pennsylvania:

SIR: You are hereby notified that it is my intention to contest the election by which you are returned as the member from the eleventh congressional district in Pennsylvania to the House of Representatives of the United States for the thirty-second Congress; the said election having been held on the second Tuesday of October, (the 8th day,) 1850.

I shall proceed under the provisions of an act of Congress of the United States, entitled "An act to prescribe the mode of obtaining evidence in cases of contested elections," passed during the thirty-first Congress, of which you will take notice.

The following are the grounds upon which I rely in the said contest, to wit:

1. That the election at the Danville borough poll and the Mahoning poll, within the present county of Montour, and both within the said congressional district, were irregularly and illegally conducted:

First. In the reception of votes, by the officers of both election boards, from persons who were not, at the time, qualified electors within the meaning of the statutes of Pennsylvania—the said persons being, at the time, either under the age of twenty-one years, non-residents, foreigners not naturalized, or persons not regularly assessed or returned; neither of which classes of persons are, by the laws of Pennsylvania, entitled to the elective franchise, so as to be legally qualified to vote for a candidate for the office of member of the House of Representatives of the United States.

Second. That the officers of the said Danville borough election board allowed and permitted persons to introduce and deposit ballots in the box for representative aforesaid, who were not members nor officers of the said board.

Third. That the officers of the said Danville borough election board also allowed and permitted persons who were not members of the said board, and not duly qualified to act as such, to handle and take tickets out of the box deposited there for representative as aforesaid; and also permitted and allowed such disqualified persons to sum up and count such votes, so deposited as aforesaid, as well as to keep tallies of them, in violation of the laws of Pennsylvania.

Fourth. That certain of the ballots deposited in the box for representative as aforesaid, at the said Danville borough election poll, for the undersigned, contestant, were rejected, thrown out, and not counted by the said board; and that in fact, and as the undersigned verily believes, a large number of votes deposited for him for representative, as aforesaid, were not allowed him by the said election board, in violation of the law governing such election.

Fifth. That the ballots deposited in the box for representative, as aforesaid, at the said Danville borough poll, do not correspond in number with the list of the names of voters, nor with the tally lists kept by the proper officers in conducting said election.

Sixth. That at the said Danville borough poll persons were permitted to vote for representative, as aforesaid, whose names were not on the list of taxables furnished by the county commissioners, and that the reasons of such votes were not inserted by the inspectors of said election opposite the names of said voters in the said list, nor by the clerks of said election in the list of voters kept by them at such election.

Seventh. That two of the officers of the said Danville borough poll were ineligible and not competent, according to law, to hold and conduct the said election.

2. The returns of the election for representative aforesaid, in and for the several districts composing the present county of Montour, were irregular and illegal, because the statutes of Pennsylvania require one of the lists of voters, tally-papers and certificates, duly sealed, to be returned into the office of the prothonotary of the proper county within three days after any general election; and the said election papers and returns of the said several districts of *now* Montour county were not made into the office of the prothonotary of any county for more than one month after the said election, and were never returned or filed in the office of the

prothonotary of Columbia county, as they should have been, the said county of Montour not being a county created and organized at that time, but being still a part of the county of Columbia within the Pennsylvania apportionment act for representatives in Congress, passed the 25th day of March, 1843.

3. A return judge of Montour county should not have been permitted to take a seat at the meeting of judges assembled for the summing up of the votes cast for representative in Congress. in the several counties composing the eleventh congressional district, Montour not being a county at the time, or a separate election district, so as to entitle her to send a return judge agreeably to the statute of Pennsylvania. The ninth section of the statute erecting Montour county, passed 3d May, 1850, provides that "the citizens of the counties of Columbia and Montour shall, until the next apportionment by the legislature, elect members of the House of Representatives, Senate and Congress, as if this act had not been passed," (Pamphlet Laws of 1850, page 660;) and no new congressional apportionment has since the passage of said act been made.

4. That persons were permitted and allowed to vote at the election polls in Pittston, and the borough of White Haven, in the county of Luzerne, and at the election polls at Bloom and Briar creek, in the county of Columbia, and at the election polls at Braintrim, in the county of Wyoming, the same election polls being within the eleventh congressional district, for representative aforesaid, who were not entitled respectively to vote at such election polls.

5. That one of the clerks of the borough of Wilkesbarre poll, in the said county of Luzerne, was incompetent by law to act as an officer of the board, at the said election for representative aforesaid, he being at the time the chief clerk and agent of the postmaster at the said borough of Wilkesbarre, having the charge of the post office at that place.

6. The certificate of the return judges does not on its face present a case under the laws of the United States, and of the State of Pennsylvania, as to entitle the person to take his seat by virtue of it.

And so the said contestant avers, and verily believes, that at the several polls above named and particularly specified there were illegal votes enough polled and counted to have changed the result of the said election, and that if the said illegal votes had not been received and enumerated, the undersigned would have had a majority of all the votes cast in the said eleventh congressional district for representative as aforesaid; and that the several illegal acts committed by the said several election boards, together with the informalities of law thereto pertaining, are sufficient in law and fact to entitle the undersigned, contestant, to a seat in the thirty-second Congress from the said eleventh congressional district of Pennsylvania.

HENDRICK B. WRIGHT.

WILKESBARRE, *Pa.*, *February* 27, 1851.

A majority of the committee deeming this notice sufficiently certain and definite to apprise the sitting member of the reasons "*of the grounds*" on which his election was contested, overruled this objection. The first section of the law which directs the contestant to give notice to the sitting member reads in conclusion thus: "And in such notice shall specify particularly the grounds upon which he relies in the contest." What are the "grounds," the reasons on which the seat is to be contested? The notice furnishes us with the answer: The gross and flagrant misconduct and irregularities of the officers constituting the election board, and also the reception of such a number of illegal votes as changed the result of the election. The intention of the law requiring this notice to be given was to prevent any surprise being practiced, to put the sitting member upon a proper defence. As no surprise has been alleged—no want of due information protested—the committee could but conclude that the notice, within the purview of the law, was all-sufficient. If, as the sitting member contends, the act required that the names of the illegal voters should have been particularly specified in the notice, we would certainly have the fact set forth and declared in the sixth section, which provides that the "names of the witnesses to be examined, and their places of residence, should be given, by leaving a copy with the person to be notified, at his usual place of abode, at least ten days before the examination." The furnishing of a list of names of the illegal voters might possibly have put the sitting member in a stronger position to rebut the contestant's proof; but that the contestant was required to furnish such a list is not within the letter nor demanded by the spirit of the statute.

What are we to understand by a specific statement of the contestant's case? Most certainly the grounds upon which he relies in the contest, and not an [illegible] of the names of the illegal voters. Such a construction would at

times render it impracticable to detect and expose the most flagrant abuses on the elective franchise, and this law, which was intended to facilitate such detection and exposure, would have the opposite effect. The circumstances attending this case afford the strongest exemplification of this fact. From the unusual large vote polled at this election in the Danville precinct (being near two hundred more than usual) the contestant was induced to suspect the receiving of fraudulent and illegal votes. The vote in the Danville precinct the October following the election of members of the thirty-second Congress was five hundred and fifty-five; being one hundred and seventy-six less than the year before. At this election (1851) there was a candidate for governor of the State, as also candidates for the supreme and district courts, voted for, from which it is fair to presume that every vote was polled. The discrepancy of the vote of the year immediately preceding the election contested is still more glaring; the number falling short by two hundred and sixty-eight compared with the vote of 1850. An examination satisfied him of the truth of his suspicions. He served the notice, cited above, on the sitting member, and had subpœnas issued by a United States commissioner, demanding the attendance of some one hundred and eighty witnesses, whom he had reason to believe were of the class of illegal voters, or whose testimony might assist him in ferreting out the abuses complained of. Of this number so subpœnaed, only some sixty-three appeared in pursuance of the summons. The remaining number putting the process at defiance, obstinately and contemptuously refused to appear. Ignorance of the laws may be pleaded in their justification, (a large proportion of the voting population being foreigners, engaged in different sorts of manufactories, and possessing few or no opportunities of legal information,) but their employers and advisers cannot claim the benefit of any such extenuation. They are presumed to have known the law, and their conduct in advising and counselling their ignorant dependents to a contemptuous disregard of the process of a United States commissioner, and that done manifestly with the design of suppressing investigation into alleged corruptions, cannot be too severely reprobated by the House. It may be inquired Why did not the commissioner coerce the attendance of these witnesses by process of attachment? The answer is found in the fact that no such power is given in the act of Congress, and he was deterred from using a doubtful power by the threats of a severe prosecution—threats made by the counsel of the contestant in his presence, and in the presence of the commissioner at the time of performing his official duty. The committee do not mention these circumstances to prejudice the right of the sitting member, for it affords us pleasure to state that we have no evidence of any participation by him in this highly criminal conduct of his attorney and friends; but to show that in such a community—so excited, so ignorant, so badly counselled—it was impossible for the contestant to give the names of the illegal voters in his notice.

But besides all this, if it should be assumed that in the mere canvassing of voters to test their legality, without at all intending to reflect upon the officers of the election board in the discharge of their duties, the names of the supposed illegal voters are required by the laws to be specified in the notice, yet there is another point upon which a majority of your committee cannot doubt the sufficiency of the notice to sustain the conclusions of this report.

It is alleged in the notice that the election at Danville was illegally and irregularly conducted, and in what manner is particularly specified, by reason of which the result of the election of the sitting member was effected and secured.

Here is a full, replete, and grave charge. It involves the conduct of the officers, and alleges the results of that conduct. Under the specifications of the notice, the majority of the committee fully concur that contestant could take evidence touching the qualifications, the duties, the acts, and conduct of the officers; and upon this view, independent of the other, we hold the notice to be good and sufficient, and *in compliance with the laws.*

Having disposed of this preliminary point, the committee proceeded to the examination of the law and testimony involved in this case. In discharging the last duty, the committee considered that, although the House of Representatives, by virtue of the fifth section of the first article of the federal Constitution, are made the judges of the election returns and qualifications of its members, yet this power is not plenary, but is subordinate to the second and fourth sections of the same article—the first of these sections providing that the electors of the members shall have the qualifications requisite for the most numerous branch of the State legislature; the fourth section empowering and authorizing the legislature in each State to prescribe the places, times, and manner of holding elections for senators and representatives—such regulations being subject to alterations made by the Congress.

By force of these provisions, the House is compelled, when adjudicating in any matter affecting the elections, returns, or qualifications of any of its members, to make the law of the respective States from which such members may be returned its rule of action.

As suggested above, the contestant confined his objection before the committee to two specifications contained in his notice, viz: the misconduct of the election board at the Danville precinct, and the illegality of votes received at that precinct. The committee, believing that a knowledge of the Pennsylvana election laws is absolutely necessary to enable the House to form a correct judgment on the merit of these objections so made by contestant, have extracted the following clear and intelligible analysis of these laws, as prepared by Judge King in the contested election case of Kneass, reported in Parsons's Equity Select Cases.

JUDGE KING'S OPINION.

But another class of applicants to vote may present themselves, viz: persons who are not to be found on the official or alphabetical list of the white freemen and qualified electors in the possession of the inspectors. What is required of the inspectors under such circumstances? The answer to this inquiry is found in the 66th section of the act of assembly regulating elections. This section declares that "in all cases where the name of the person claiming to vote is *not found* on the list furnished by the commissioners, *or* his right to vote, whether found thereon or not, is objected to by any qualified citizen, it shall be the *duty* of the inspectors to examine such person, on oath, as to his qualifications; and if he claims to have resided within the State for one year or more, his oath shall be sufficient proof thereof; *but* he shall make proof by at least one competent witness, *who shall be a qualified elector*, that he has resided in the district for more than ten days next immediately preceding said election, and shall also himself swear that his *bona fide* residence, in pursuance of his lawful calling, is within the district, and that he did not move into said district for the purpose of voting therein." The language of this law is so clear, and the policy of it so obvious, that it admits of no construction qualifying its letter as respects persons not found in the official list. It is from votes offered by this class of persons that the great danger of election frauds arises. If election officers should receive votes from such persons without the inquiry as to residence required by the act, the consequence may be easily divined. Whoever could procure the greatest number of reckless men, ready to offer votes in districts where they were not entitled to vote, would be certain of triumph; for such men could operate not merely at one poll, but in all others where votes should be received with the same facility. It is true that this might be to some extent arrested by citizens challenging such voters. But that would afford too uncertain a security against an act of so mischievous and dangerous a character. The legislature has, therefore, most wisely provided an efficient remedy in the case, and that consists in making it the duty of the inspectors to examine every person offering to vote whose name is not found on the alphabetical list, whether he is challenged or not, as to his qualifications to vote, and to demand other testimony than his own of his actual residence in the district ten days before the election. A rigid and faithful execution of this part of the election law is absolutely indispensable to a fair election. Neglect or evasion of this duty is one of the grossest irregularities, if nothing worse, that election officers could commit.

The manner of receiving and recording votes is also prescribed, and the procedure in this respect, demanded by the law, is most important to the prevention of fraud. Whenever an inspector receives the ticket of an elector he is required to call out the name of such elector, which shall be entered by the clerks on *separate lists:* and the name is to be repeated by each of them, and the inspectors are to insert the letter V in the margin of the alphabetical

list opposite the name of such elector. This provision is obviously intended to prevent imposters voting in the name of true electors, who have already voted; which might be permitted through inadvertency if the inspector did not mark the vote according to law. If evidence of the naturalization of a voter has been produced, the inspector is also required to note the facts in the margin of the list; and where proof of residence has been made he is also required to note the name of the person making such proof. The name of the person admitted to vote not on the list is to be inserted by the inspectors, and a note made opposite thereto by writing the word 'tax,' if he shall be admitted to vote by reason of having paid a tax, and 'age,' if he shall be admitted to vote on account of age; and in *either case the reason of such vote shall be called out to the clerks, who shall make the like notes on the list of voters kept by them.*

All these provisions are of great practical value. But that which requires the inspectors to insert the name of a voter not on the list, whose vote has been received in consequence of having given proof of residence in the district, and also the name of the person proving such residence, is the most important. The obligation of the inspectors to perform this duty is a perpetual admonition to them of the necessity of requiring such proof before receiving a vote not on the list, and serves to prevent the reception of such votes otherwise than according to law, whether from fraud, indolence, or carelessness. As the witness proving residence is required to be a qualified elector, it serves to furnish the means of inquiring into the true history of such a vote, in the event of a contest of the election. And the fact that a party proving such residence not only is required to swear to the fact, but be placed on record of the election as having made such oath, must make men cautious how they swear to what they do not certainly know. This direction is among the vital provisions of the law, which no inspector, disposed faithfully to execute his duties, ought to omit, and the absence of which must tend to make the conduct of the election suspicious, if not absolutely illegal."

Adopting and making this analytical construction of the Pennsylvania election law our rule of action, let us proceed to the inquiry: 1st, whether the election board was guilty of such impropriety of conduct as charged; 2d, whether such a number of illegal votes were received as to change the result of the election. The evidence furnished the committee proves that the judge, Mr. Kitchen, elected by the people to officiate in the particular capacity of judge, did, for a great portion of the time while the election was going on, neglect his peculiar business, and was engaged in discharging the duty of inspector. Not only the oath but the duties of these officers are entirely different. The two inspectors are required to stand at the window to receive votes, and whenever they may disagree respecting the qualifications of a voter, the judge is to decide between them. His duty is strictly that of an umpire. His oath carries no further obligation with it. Usurping the duties of an inspector, he was, *pro hac vice*, an unsworn officer. If this irregularity of conduct of the judge could be considered as resulting from ignorance or casual carelessness, it might not demand the serious attention of the House; but this was not the case.

The duties of both Mettler and McAllister, which were to receive the tickets, were assumed by the judge, and they assigned exclusively to other duties.

The testimony of the judge himself forbids this extenuation; for when asked, "Was, or was not, the election fairly and honorably conducted?" he answered, "*After the tickets* came in it was all fairly and honestly conducted, as far as I know."

There is here no unqualified affirmance that the election was fairly and honestly conducted; but an apparent evasion, if not a miserable quibbling.

The committee is not disposed to attach much importance to any out-door declarations made in familiar, jocose moments; but the declarations made by the witness Mettler, when acting as inspector at the ensuing special election, are not of this description. At this time we find this inspector rejecting votes as illegal which had been received at the previous election, and when some disappointed applicant observed that he voted in the fall, Mettler replies, "Yes, but I am here now myself, and you must produce your papers or you do not vote." This was neither an idle, foolish, nor jocose remark, but was made in sober response to an illegal application to vote, and should go far towards satisfying us that the exchange of official positions made by the judge and myself at the fall election was intended to cloak a fraud on the ballot-box. The House

THIRTY-FIRST CONGRESS, SECOND SESSION.

W. S. MESSERVY, *of New Mexico.*

The claimant was sent to Washington by certain inhabitants of New Mexico to represent them in Congress before the Territory was organized. Held by the committee that his claim should be rejected. The case was not acted on in the House.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 6, 1851.

Mr. STRONG, from the Committee of Elections, made the following report:

By the treaty of Guadalupe Hidalgo, which transferred to the United States the sovereignty of the country now known as the Territory of New Mexico, the political organization which had previously existed there was extinguished, and the inhabitants were left without any form of government recognized by our Constitution and laws. It was, doubtless, supposed that Congress would, without delay, organize there a territorial government, of a similar character with those which have heretofore been formed for other portions of our unorganized territory. Owing to causes to which it is unnecessary now to refer, this expected action of Congress was long delayed, and the resident population of the country were left to suffer all the evils and embarrassments which attend a disorganized state of society and the absence of a regular government. Tired of waiting for the unsolicited action of Congress, and with a view to remedy these evils, a large number of the citizens assembled at Santa Fé, on the 21st day of August, A. D. 1849, to consult upon the propriety of organizing a suitable territorial government. At this meeting it was resolved to recommend to the inhabitants of the country the election of delegates to a general convention, the object of which should be "to concert such plans and adopt such measures as might be most effectual for the attainment of good civil government." In furtherance of this resolution, (as has heretofore been stated by your committee in a former report,) Lieutenant Colonel B. L. Beall, then the acting military commandant at Santa Fé, issued a proclamation to the citizens of New Mexico, recommending to them to assemble in mass meetings in their different counties, and at designated places, on the 10th day of September, 1849, for the purpose of electing delegates to a general convention to be held at Santa Fé on the 24th day of September then next ensuing. The proclamation averred the object of the convention to be "the concert of such plans and the adoption of such measures as might be most effectual to the attainment of a good civil government, and the appointment of a delegate to go to Washington to enforce its suggestions and to urge the early action of Congress in its behalf." In conformity with the recommendations of this proclamation, elections were held, and the persons elected met in convention at Santa Fé on the 24th day of September, A. D. 1849, and on the same day elected Hugh N. Smith, esq., to be a delegate to represent the interests of the Territory of New Mexico in the Congress of the United States. The convention then proceeded to prepare a plan to be submitted to Congress, as the basis upon which they desired the civil government of New Mexico to be formed, and forwarded the same by Mr. Smith, with instructions to urge upon Congress to give to the country a territorial government, embracing the provisions contained in the plan by them recommended. Mr. Smith received a commission as a delegate, signed by the president of the convention, and attested by its secretary. Thus elected and instructed, and with this commission, Mr. Smith presented himself at the first session of this Congress, and asked to be admitted to a seat as a delegate.

The House, however, on the 19th day of July, A. D. 1850, refused to accord to him the seat which he claimed. While these proceedings were pending, and long before any decision upon the application of Mr. Smith had been made, on the 25th day of May, A. D. 1850, another convention was assembled at Santa Fé. This convention formed a constitution for a *State* government. The preamble of the constitution declares that the people of New Mexico did "ordain and establish the following constitution," and did mutually agree with each other to form themselves into a free and independent State, named New Mexico. The tenth section of the schedule attached to this constitution provided that the military and civil governor of the Territory should be requested, immediately on the adjournment of the convention, to issue writs of election to the prefects of the several counties, requiring them to cause an election to be held on the 20th day of June, A. D. 1850; the electors to vote for or against this constitution, for a governor and lieutenant governor, a representative in the Congress of the United States, and senators and representatives to the legislature. The same section of the schedule made provision for the manner in which the votes should be counted, and directed that the returns should be forwarded to the secretary of the Territory, who should transmit them to the legislature on the first day of their session. The eleventh section of the schedule directed that the governor elect, or the lieutenant governor acting as such, should certify the returns of votes for or against the adoption of the constitution, and should send them to the Secretary of State of the United States within thirty days from the day of election. The twelfth section is as follows:

It shall be, and is hereby made, the duty of the governor, or lieutenant governor acting as such, if it appears from the returns of the votes for and against this constitution that it has been adopted by the people, immediately to cause a fair copy of the same, together with a fair digest of the votes given for and against the constitution, to be forwarded to the President of the United States, to be laid before the Congress of the United States.

On the 28th day of May, A. D, 1850, John Munroe, styling himself "civil and military governor of the Territory of New Mexico," issued his proclamation, (a copy of which is appended to this report,) reciting the proceedings of the convention and directing an election to be held in accordance with the provisions of the tenth section of the schedule of the constitution, on the 20th day of June, A. D. 1850. The proclamation contained the following proviso: "It being provided and understood that the election of all officers in this election can only be valid by the adoption of the constitution by the people, and otherwise null and void; and that all action of the governor, lieutenant governor, and of the legislature, shall remain inoperative until New Mexico be admitted as a State under said constitution, except such acts as may be necessary for the primary steps of organization and the presentation of said constitution properly before the Congress of the United States. The present government shall remain in full force until by the action of Congress another shall be substituted."

An election was accordingly held, and six thousand seven hundred and seventy-one votes were given in favor of, and thirty-nine votes against, the adoption of the constitution. At the same time Henry Connelly was elected governor, Manuel Alvarez lieutenant governor, and William S. Messervy a representative in Congress, he having received four thousand nine hundred and thirty-four votes, and Hugh N. Smith three thousand four hundred and seventy-four votes, for that office. The legislature met and elected two persons to represent the State in the Senate of the United States.

Thus elected, Mr. Messervy claims to be admitted to a seat in the House of Representatives, as a delegate from the Territory of New Mexico, on the same footing with the delegates from the Territories heretofore organized under the laws of the United States. He presents the following as his credentials:

UNITED STATES OF AMERICA,
State of New Mexico.

I, Manuel Alvarez, governor of the State of New Mexico, do hereby certify that William S. Messervy was, on the 20th day of June, A. D. eighteen hundred and fifty, duly elected by the qualified voters of the State of New Mexico to represent said State in the thirty-first Congress of the United States.

In testimony whereof, I have hereunto set my hand, and affixed my private seal, there being no seal for the State. Done in the city of Santa Fé, this ninth day of July, [L. S.] A. D. eighteen hundred and fifty.

MANUEL ALVAREZ.

By the governor:

LEWIS D. SHEETZ, *Secretary of State.*

A similar certificate is also presented, signed by a certain Donaciano Vigil who calls himself secretary of the Territory of New Mexico.

The foregoing are all the facts which relate to the application of Mr. Messervy, and in the opinion of your committee they show not merely that he has no rightful claim to the seat which he asks, but that it would be highly inexpedient to admit him.

It may be observed that the application for admission as a *territorial* delegate is directly in conflict with Mr. Messervy's credentials. It is an attempt to change the character in which he was sent. The constituency which elected him sought to obtain a State, not a territorial form of government. In transmitting their constitution they sought for the admission of New Mexico into the Union as a State, and for the reception of Mr. Messervy as the constitutional representative of the people of a State in the Union. By no action of theirs did they authorize him to act in an inferior or any other capacity than as such a representative. Nothing which they have done can be construed into the expression of a desire that the person whom they sent should sit on the floor of the House until the admission of New Mexico into the Union. On the contrary, it may fairly be inferred that the choice which they made of a State form of government negatives the wish to have merely a territorial delegate here. It is not easy to perceive how the House can with any propriety aid the applicant thus to throw off the authority conferred upon him by the people who sent him, and assume another with which he was never invested.

But leaving this consideration, and conceding for the present that he was elected and sent to act as a territorial delegate, your committee are of opinion that his admission would be impolitic, and a dangerous precedent. It would be a departure from all the established usages of the government. It need not be said that the House of Representatives is now and ever has been composed exclusively of members elected under the Constitution and laws of the United States, and in accordance with the provisions of that Constitution and those laws. During its entire existence of more than sixty years no person elected in any other mode, or sent from any constituency unknown to the Constitution and laws, has been admitted to a seat. Territorial delegates have indeed been admitted, and it is true that they are not mentioned in the Constitution. But they have in every instance been admitted under an unvarying rule. In every case the delegate has been chosen under laws enacted by Congress, and from a Territorial government subordinate to and emanating from the Constitution and laws of the United States. The celebrated ordinance of July 13, 1787, made the first provision for the election and admission of a territorial delegate. It provided that the legislature of the Territory northwest of the Ohio might elect by joint ballot a delegate to Congress, who should have a seat in the House of Representatives during the existence of the territorial government, with the privilege of debating, though not of voting. That ordinance was contemporaneous in its passage with the formation of the federal Constitution, and was recognized by it. It was also affirmed by an act of the first Congress, and a delegate thr- ' 'ed was permitted to hold his seat. In accordance with this

precedent, as other territorial governments have been formed, and became entitled under their organic law to legislative assemblies, Congress has uniformly provided by law for the election of a delegate with similar privileges. In some instances the law has provided that the delegate should be elected by the territorial legislature, and in others by the people included under the government. But in every case the delegate admitted has been chosen under laws previously enacted by Congress, and from a government subordinate to and emanating from the Constitution and laws of the United Sta ts. So uniform has been this usage, and so well understood, that by the act of Congress o March 3, A. D. 1817, the term of office and the privileges of such delegates were expressly defined. That act, however, speaks only of delegates from temporary governments then established, or which might thereafter be created, and which were or might be thereafter authorized by act of Congress to send delegates. No provision was made for any other. It was not contemplated that there could be any other. It may, therefore, safely be averred that the basis upon which rests the admission of a territorial delegate, if not constitutional, is fundamental. There have been political organizations in parts of the unorganized territory of the United States, but none such have been permitted to enjoy representation here. The case of Almon W. Babbitt, who claimed to be admitted as a delegate from Deseret during the last session of this Congress, is in most respects similar to this. In that case a State government had been formed, and Mr. Babbitt had been elected by the legislature, but this house refused to admit him to a seat. The case of Hugh N. Smith, already mentioned, affords another instance of the adherence of the House to the unbroken usage of past years. If it be regarded as a question of expediency, both his case and Mr. Babbitt's in many aspects presented stronger claims than the one now under consideration. The one was elected by a convention—the other by the people in mass. In both these cases, appealing strongly, as they did, to the discretion of the House, no departure was permitted from former practice. Precedents so numerous, usage so unbroken, extending through all our past history, should have controlling influence in the exercise of the discretion of the House. Unlike all who have been admitted as territorial delegates, Mr. Messervy founds his application upon neither the Constitution nor laws of the United States. His election was not subordinate to, but in disregard of them—in hostility even to the territorial government subsequently formed by Congress.

The argument in favor of the applicant is, that the resident population of New Mexico should be represented. As already observed, it is neither the theory nor the practice of our government that any individuals living under no political organization should enjoy either complete or partial representation. The admission of such a principle would be eminently dangerous. Your committee, however, do not propose to discuss the evils which would inevitably follow the establishment of such a precedent. They have already done this in a report heretofore submitted to the House, which received its sanction. It should, however, be remembered that the supposed necessity which was averred to exist in the case of Mr. Babbitt and Mr. Smith has no existence in this case. Provision has already been made by law for a territorial delegate. The act of Congress of September 9, A. D. 1850, provided for the establishment of a territorial government over New Mexico. The fourteenth section of that act authorized the election of a territorial delegate, and provided that the first election should be held at such time and places, and be conducted in such manner, as the territorial governor should appoint and direct, and that at all subsequent elections the times, manner, and places should be prescribed by law. True, the provisions of that act were suspended until the boundary between the United States and the State of Texas should be adjusted; but that boundary having been determined, the act is now in force. There is, therefore, at this day provision made by law for territorial representation of New Mexico. It necessa-

rily negatives both the legality and expediency of any other. Mr. Messervy has no pretensions to having been elected under this organic law; but, on the contrary, his credentials are in antagonism to it. Were he admitted to the seat which he claims, there would be no legal impediment to the admission of another delegate from the Territory of New Mexico. It may be, indeed, that no such delegate will appear during this Congress; and should such be the case, your committee are unable to perceive that any serious evils would result either to New Mexico or to the country at large. Certainly no such overruling necessity is shown to exist as should induce the House to disregard a uniform usage of more than sixty years, and establish a precedent which may lead to unending confusion in the future.

Your committee unanimously recommend the adoption of the following resolution:

Resolved, That William S. Messervy, esq., be not admitted to a seat in the House as a delegate from the Territory of New Mexico.

The case was not acted upon in the House.

THIRTY-SECOND CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. DISNEY, Ohio.
ASHE, North Carolina.
WILLIAMS, Tennessee.
HAMILTON, Maryland.
SCHERMERHORN, New York.
Mr. CASKIE, Virginia.
EWING, Kentucky.
DAVIS, Massachusetts.
GAMBLE, Pennsylvania.

WRIGHT *vs.* FULLER, *of Pennsylvania.*

The intent of the law, requiring notice to be given specifying the particular grounds of the contest, was to prevent any surprise being practiced upon the sitting member, and to put him upon a proper defence. It is not necessary to furnish the incumbent with a list of alleged illegal voters.

A contestant can take evidence touching the qualifications, duties and acts, and conduct of officers conducting an election.

The House is compelled, when adjudicating in any matter affecting the elections, returns, or qualifications of any of its members, to make the law of the respective States, from which such members may be returned, its rule of action.

A judge of an election cannot usurp the duties of an inspector.

The House laid the whole subject upon the table.

IN HOUSE OF REPRESENTATIVES,

APRIL 22, 1852.

Mr. ASHE, from the Committee of Elections, made the following report:

The petition of the contestant, with all of the accompanying papers, was referred to the committee on the 10th of December last, since which time the committee have been most assiduously employed in the examination of the testimony taken in this case under the provisions of the act of last Congress, regulating the mode and manner of taking evidence in contested elections, and in hearing arguments from both parties on the merits of the case. The sitting member produced before the committee regularly authenticated returns from the different election precincts composing the 11th district, which, summed up, give

he sitting member 6,216, and the contestant 6,157, leaving in favor of the sitting member a majority of 59 votes. The contestant, considering himself aggrieved by the mode and manner in which the election in the Danville precincts, in the county of Montour, was conducted, (the returns of which are 32 for contestant and 659 for sitting member,) served, within the time prescribed by law, a notice on the sitting member of his intention to contest his seat. The sitting member admitted the service of the notice, and, as empowered by the last clause of 1st section of the above act, gave due information to the contestant " of the other ground upon which he rested the validity of his election." As the sitting member raised before the committee an objection that the contestant's notice was insufficient—not being in compliance with the requirement of the act of Congress—the committee have thought it but proper to transcribe the notice in full, so that the House might be enabled to determine what weight should be given to the objection:

To Henry M. Fuller, esq., returned as member elect to the thirty-second Congress of the United States, from the eleventh congressional district of the State of Pennsylvania:

SIR: You are hereby notified that it is my intention to contest the election by which you are returned as the member from the eleventh congressional district in Pennsylvania to the House of Representatives of the United States for the thirty-second Congress; the said election having been held on the second Tuesday of October, (the 8th day,) 1850.

I shall proceed under the provisions of an act of Congress of the United States, entitled "An act to prescribe the mode of obtaining evidence in cases of contested elections," passed during the thirty-first Congress, of which you will take notice.

The following are the grounds upon which I rely in the said contest, to wit:

1. That the election at the Danville borough poll and the Mahoning poll, within the present county of Montour, and both within the said congressional district, were irregularly and illegally conducted:

First. In the reception of votes, by the officers of both election boards, from persons who were not, at the time, qualified electors within the meaning of the statutes of Pennsylvania—the said persons being, at the time, either under the age of twenty-one years, non-residents, foreigners not naturalized, or persons not regularly assessed or returned; neither of which classes of persons are, by the laws of Pennsylvania, entitled to the elective franchise, so as to be legally qualified to vote for a candidate for the office of member of the House of Representatives of the United States.

Second. That the officers of the said Danville borough election board allowed and permitted persons to introduce and deposit ballots in the box for representative aforesaid, who were not members nor officers of the said board.

Third. That the officers of the said Danville borough election board also allowed and permitted persons who were not members of the said board, and not duly qualified to act as such, to handle and take tickets out of the box deposited there for representative as aforesaid; and also permitted and allowed such disqualified persons to sum up and count such votes, so deposited as aforesaid, as well as to keep tallies of them, in violation of the laws of Pennsylvania.

Fourth. That certain of the ballots deposited in the box for representative as aforesaid, at the said Danville borough election poll, for the undersigned, contestant, were rejected, thrown out, and not counted by the said board; and that in fact, and as the undersigned verily believes, a large number of votes deposited for him for representative, as aforesaid, were not allowed him by the said election board, in violation of the law governing such election.

Fifth. That the ballots deposited in the box for representative, as aforesaid, at the said Danville borough poll, do not correspond in number with the list of the names of voters, nor with the tally lists kept by the proper officers in conducting said election.

Sixth. That at the said Danville borough poll persons were permitted to vote for representative, as aforesaid, whose names were not on the list of taxables furnished by the county commissioners, and that the reasons of such votes were not inserted by the inspectors of said election opposite the names of said voters in the said list, nor by the clerks of said election in the list of voters kept by them at such election.

Seventh. That two of the officers of the said Danville borough poll were ineligible and not competent, according to law, to hold and conduct the said election.

2. The returns of the election for representative aforesaid, in and for the several districts composing the present county of Montour, were irregular and illegal, because the statutes of Pennsylvania require one of the lists of voters, tally-papers and certificates, duly sealed, to be returned into the office of the prothonotary of the proper county within three days after any general election; and the said election papers and returns of the said several districts of *now* Montour county were not made into the office of the prothonotary of any county for more than one month after the said election, and were never returned or filed in the office of the

prothonotary of Columbia county, as they should have been, the said county of Montour not being a county created and organized at that time, but being still a part of the county of Columbia within the Pennsylvania apportionment act for representatives in Congress, passed the 25th day of March, 1843.

3. A return judge of Montour county should not have been permitted to take a seat at the meeting of judges assembled for the summing up of the votes cast for representative in Congress. in the several counties composing the eleventh congressional district, Montour not being a county at the time, or a separate election district, so as to entitle her to send a return judge agreeably to the statute of Pennsylvania. The ninth section of the statute erecting Montour county, passed 3d May, 1850, provides that "the citizens of the counties of Columbia and Montour shall, until the next apportionment by the legislature, elect members of the House of Representatives, Senate and Congress, as if this act had not been passed," (Pamphlet Laws of 1850, page 660;) and no new congressional apportionment has since the passage of said act been made.

4. That persons were permitted and allowed to vote at the election polls in Pittston, and the borough of White Haven, in the county of Luzerne, and at the election polls at Bloom and Briar creek, in the county of Columbia, and at the election polls at Braintrim, in the county of Wyoming, the same election polls being within the eleventh congressional district, for representative aforesaid, who were not entitled respectively to vote at such election polls.

5. That one of the clerks of the borough of Wilkesbarre poll, in the said county of Luzerne. was incompetent by law to act as an officer of the board, at the said election for representative aforesaid, he being at the time the chief clerk and agent of the postmaster at the said borough of Wilkesbarre, having the charge of the post office at that place.

6. The certificate of the return judges does not on its face present a case under the laws of the United States, and of the State of Pennsylvania, as to entitle the person to take his seat by virtue of it.

And so the said contestant avers, and verily believes, that at the several polls above named and particularly specified there were illegal votes enough polled and counted to have changed the result of the said election, and that if the said illegal votes had not been received and enumerated, the undersigned would have had a majority of all the votes cast in the said eleventh congressional district for representative as aforesaid; and that the several illegal acts committed by the said several election boards, together with the informalities of law thereto pertaining, are sufficient in law and fact to entitle the undersigned, contestant, to a seat in the thirty-second Congress from the said eleventh congressional district of Pennsylvania.

HENDRICK B. WRIGHT.

WILKESBARRE, *Pa.*, *February* 27, 1851.

A majority of the committee deeming this notice sufficiently certain and definite to apprise the sitting member of the reasons "*of the grounds*" on which his election was contested, overruled this objection. The first section of the law which directs the contestant to give notice to the sitting member reads in conclusion thus: "And in such notice shall specify particularly the grounds upon which he relies in the contest." What are the "grounds," the reasons on which the seat is to be contested? The notice furnishes us with the answer: The gross and flagrant misconduct and irregularities of the officers constituting the election board, and also the reception of such a number of illegal votes as changed the result of the election. The intention of the law requiring this notice to be given was to prevent any surprise being practiced, to put the sitting member upon a proper defence. As no surprise has been alleged—no want of due information protested—the committee could but conclude that the notice, within the purview of the law, was all-sufficient. If, as the sitting member contends, the act required that the names of the illegal voters should have been particularly specified in the notice, we would certainly have the fact set forth and declared in the sixth section, which provides that the "names of the witnesses to be examined, and their places of residence, should be given, by leaving a copy with the person to be notified, at his usual place of abode, at least ten days before the examination." The furnishing of a list of names of the illegal voters might possibly have put the sitting member in a stronger position to rebut the contestant's proof; but that the contestant was required to furnish such a list is not within the letter nor demanded by the spirit of the statute.

What are we to understand by a specific statement of the contestant's case? Most certainly the grounds upon which he relies in the contest, and not an enumeration of the names of the illegal voters. Such a construction would at

times render it impracticable to detect and expose the most flagrant abuses on the elective franchise, and this law, which was intended to facilitate such detection and exposure, would have the opposite effect. The circumstances attending this case afford the strongest exemplification of this fact. From the unusual large vote polled at this election in the Danville precinct (being near two hundred more than usual) the contestant was induced to suspect the receiving of fraudulent and illegal votes. The vote in the Danville precinct the October following the election of members of the thirty-second Congress was five hundred and fifty-five; being one hundred and seventy-six less than the year before. At this election (1851) there was a candidate for governor of the State, as also candidates for the supreme and district courts, voted for, from which it is fair to presume that every vote was polled. The discrepancy of the vote of the year immediately preceding the election contested is still more glaring; the number falling short by two hundred and sixty-eight compared with the vote of 1850. An examination satisfied him of the truth of his suspicions. He served the notice, cited above, on the sitting member, and had subpœnas issued by a United States commissioner, demanding the attendance of some one hundred and eighty witnesses, whom he had reason to believe were of the class of illegal voters, or whose testimony might assist him in ferreting out the abuses complained of. Of this number so subpœnaed, only some sixty-three appeared in pursuance of the summons. The remaining number putting the process at defiance, obstinately and contemptuously refused to appear. Ignorance of the laws may be pleaded in their justification, (a large proportion of the voting population being foreigners, engaged in different sorts of manufactories, and possessing few or no opportunities of legal information,) but their employers and advisers cannot claim the benefit of any such extenuation. They are presumed to have known the law, and their conduct in advising and counselling their ignorant dependents to a contemptuous disregard of the process of a United States commissioner, and that done manifestly with the design of suppressing investigation into alleged corruptions, cannot be too severely reprobated by the House. It may be inquired Why did not the commissioner coerce the attendance of these witnesses by process of attachment? The answer is found in the fact that no such power is given in the act of Congress, and he was deterred from using a doubtful power by the threats of a severe prosecution—threats made by the counsel of the contestant in his presence, and in the presence of the commissioner at the time of performing his official duty. The committee do not mention these circumstances to prejudice the right of the sitting member, for it affords us pleasure to state that we have no evidence of any participation by him in this highly criminal conduct of his attorney and friends; but to show that in such a community—so excited, so ignorant, so badly counselled—it was impossible for the contestant to give the names of the illegal voters in his notice.

But besides all this, if it should be assumed that in the mere canvassing of voters to test their legality, without at all intending to reflect upon the officers of the election board in the discharge of their duties, the names of the supposed illegal voters are required by the laws to be specified in the notice, yet there is another point upon which a majority of your committee cannot doubt the sufficiency of the notice to sustain the conclusions of this report.

It is alleged in the notice that the election at Danville was illegally and irregularly conducted, and in what manner is particularly specified, by reason of which the result of the election of the sitting member was effected and secured.

Here is a full, replete, and grave charge. It involves the conduct of the officers, and alleges the results of that conduct. Under the specifications of the notice, the majority of the committee fully concur that contestant could take evidence touching the qualifications, the duties, the acts, and conduct of the officers; and upon this view, independent of the other, we hold the notice to be good and sufficient, *and in compliance with the laws.*

man voted could be readily ascertained. These returns, the contestant maintains, should all be rejected, because, as he supposes, the returns were not made according to law, the probate judge having no authority to correct his error, after having returned the abstract, by supplying the list of voters. If the abstract and list of voters had been returned at the same time, and authenticated in the same manner as they were, there would have been no departure from the strict provisions of the law. But provision is made in the 29th section of the territorial law regulating elections for the failure of the secretary "to receive any return within fifteen days after the election," by requiring him "to send a special messenger to the county failing to make the returns with orders to bring them." The presumption is, that the secretary acted in obedience to this requirement of the law; and as the additional returns were received within the time allowed for correcting the votes, the committee can see no valid objection to considering them in their calculation of the result.

Neither in these precincts of San Miguel, nor in those of any other county from which the returns are alleged by the contestant to be informal and contrary to law, have the committee been able to perceive so substantial a defect as to justify their total exclusion. In the absence of all attempt at fraud on the part of the voters, it would be manifestly unjust to deprive them of the effect of their suffrages for a slight failure upon the part of the officers conducting the election fully to comply with all the forms of law when enough is clearly shown to determine the wishes of the people.

Excluding only the vote of Laguna precinct, in the county of Valencia, which was entirely given by the Pueblo Indians, and the parties are rightfully entitled to the following votes:

County of Santa Fé, Gallegos	382	Lane	251
Doña Ana...do	...	do	288
Bernalillo ...do	751	do	952
San Miguel..do	1,397	do	262
Taos.....do	634	do	886
Socorro.....do	270	do	586
Rio Ariba...do	826	do	128
Santa Ana..do	531	do	401
Valencia....do	452	do	780
	5,243		4,535
	4,535		
Majority for Gallegos	708		

The committee, therefore, after a full examination of all the facts, are unanimously of the opinion that the Hon. José Manuel Gallegos is rightfully entitled to his seat as delegate from the Territory of New Mexico, and report the following resolution:

Resolved, That the Hon. José Manuel Gallegos is entitled to the seat as delegate from the Territory of New Mexico for the 33d Congress.

The House adopted the above resolution without debate, and without a call of the yeas and nays, February 24, 1854.

THIRTY-FOURTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. ISRAEL WASHBURNE.
STEPHENS, Georgia.
WATSON, Ohio.
SPINNER, New York.
OLIV[illegible]

Mr. HICKMAN, Pennsylvania.
COLFAX, Indiana.
SMITH, Alabama.
BINGHAM, Ohio.

In the second session, Mr. Savage, of Tennessee, in place of Mr. Oliver. In the third session, Mr. Oliver in place of Mr. Savage.

TURNEY *vs.* MARSHALL, *of Illinois.*

FOUKE *vs.* TRUMBULL, *of Illinois.*

The State legislature cannot add to the qualifications prescribed to the representative to Congress by the Constitution of the United States.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 24, 1856.

Mr. BINGHAM, from the Committee of Elections, made the following report:

The facts in these cases are as follows: In the ninth congressional district of the State of Illinois, at the election held on the 7th of November, 1854, the whole number of votes cast was 12,685: of which Mr. Marshall received 8,497; the contestant, 2,912; and Mr. Barbour, 1,276. And in the eighth congressional district of said State, at the election held on the same day, the whole number of votes cast was 13,647: of which Mr. Trumbull received 7,917; the memorialist, Mr. Fouke, 5,306; and Mr. Buskmaster, 424. Mr. Marshall was, on the 10th of March, 1851, elected a judge of the circuit court of the State of Illinois for the twelfth judicial circuit, for the term of four years and three months, was duly commissioned and qualified as such judge, and afterwards resigned said office; which resignation took effect the 10th of August, 1854.

Mr. Trumbull was, on the 7th of June, 1852, elected a judge of the supreme court of the State of Illinois for the term of nine years, and was, on the 29th day of June, 1852, duly commissioned and qualified as such judge; and in the month of August, 1853, more than one year before said election, said Trumbull resigned said office of judge.

The 10th section of the 5th article of the constitution of the State of Illinois, which was adopted on the 6th day of March, 1848, is in the words following:

"The judges of the supreme and circuit courts shall not be eligible to any other office or public trust of profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them, for any elective office (except that of judge of the supreme or circuit court) given by the general assembly or the people, shall be void."

Each of the memorialists claims the right to a seat in the 34th Congress, solely upon the ground that the votes cast for said Marshall and Trumbull, respectively, "*were null and void;*" not because of any disqualification in the electors who thus voted, but because the said Marshall had been elected a circuit judge, and the said Trumbull a supreme judge, within said State, for a term of years, and which term had not expired at the time of said election.

This presents the question whether a State may superadd to the qualifications prescribed to the representative in Congress by the Constitution of the United States?

Mr. Chancellor Kent says that "the objections to the existence of any such power appear to me too palpable and weighty to admit of any discussion."—*Kent's Commentaries*, vol. i, page 228, note.

And Mr. Justice Story, upon the same question, says that "the States can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by, dependent upon, nor controllable by the States. It is no original prerogative of State power to appoint a representative, or senator, or President for the Union."— *Story's Commentaries*, vol. ii, page 101.

The second section of the first article of the Constitution of the United States provides that the PEOPLE OF THE SEVERAL STATES shall choose their representatives in Congress every second year, and prescribes the qualifications both of the electors and the representatives.

The qualification of electors is as follows:

"The electors in each State" (who shall choose representatives in Congress) "shall have the qualifications requisite for electors of the most numerous branch of the State legislature."

The qualifications of a representative, under the Constitution, are, that he shall have attained the age of twenty-five years, shall have been seven years a citizen of the United States, and, when elected, an inhabitant of the State in which he shall be chosen. It is a fair presumption that, when the Constitution prescribes these qualifications as necessary to a representative in Congress, it was meant to exclude all others. And to your committee it is equally clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for representatives, to take away from "*the people of the several States*" the right given them by the Constitution to choose, "*every second year*," as their representative in Congress, ANY PERSON who has the required age, citizenship, and residence. To admit such a power in any State is to admit the power of the States, by a legislative enactment, or a constitutional provision, to prevent altogether the choice of a representative *by the people*. The assertion of such a power by a State is inconsistent with the supremacy of the Constitution of the United States, and makes void the provision that that Constitution "*shall be the supreme law of the land*," anything in the constitution or laws of any State to the contrary notwithstanding.

Your committee submit that the position assumed by those who claim for the States this power, that its exercise in nowise conflicts with the Constitution, or the right of the people under it to choose *any* person having the qualifications therein prescribed, has no foundation in fact.

By the Constitution the people have a right to choose as representative *any person* having *only* the qualifications therein mentioned, without superadding thereto any *additional* qualifications whatever. *A power to add new qualifications is certainly equivalent to a power to vary or change them.* An *additional qualification* imposed by State authority would necessarily *disqualify* any person who had *only* the qualifications prescribed by the federal Constitution.

Your committee cannot assent to the averment of the memorialist, Mr. Fouke, that "the question presented is not one of qualification of a member of Congress, arising under the Constitution of the United States, but a question of *election*, arising under the constitution and laws of the State of Illinois."

It is not intimated either by the memorialist, or any one else, that the persons who voted at said election in said several districts were not qualified electors, and legally entitled to vote; nor is it intimated that said election was not conducted in all respects as required by law. In short, the only point made by the memorialist is that Mr. Marshall, who received a large majority of all the votes cast in said ninth district, and Mr. Trumbull, who received a large majority of all the votes cast in the said eighth district, were each of them ineligible to a seat in Congress, not because either of them lacked any qualifica-

on prescribed by the Constitution of the United States, but because each of em was disqualified by operation of the provisions of the constitution of the tate of Illinois. If the respective terms for which those two gentlemen had en *elected* judges of the said State had expired *more than one year* before the h of November, 1854, we would have had no intimation that the votes cast r each of them *were in contemplation of law no votes;*" their election would, nder these circumstances, have been knowledged as not *disqualified* to hold the office under and by virtue of the nstitution of the State of Illinois. If the State of Illinois may thus disqualify ıy class of persons possessing all the qualifications required by the federal onstitution for a representative in Congress for a period of ten years, and nother class for a period of five years, what is there to restrain that State from nposing like disabilities upon all *citizens of the United States* residing within er territory, and thus take away from the people the right to choose repre-ntatives in Congress every second year, declaring *in effect* that only every *fth* or *tenth* year shall the people choose their representatives? It is no nswer to say that these disabilities are self-imposed by the majority of the ople of the State. The majority of the people within the several States have t the power to impair the rights of the minority guaranteed by the Constitu-on of the United States, and exercised under its authority.

By the plain letter of the Constitution Congress may prescribe the *time, lace*, and *manner* of holding elections for representatives; and at such *time* d *place*, and in the *manner* thus prescribed, every second year, the people of ch State may choose as representative in Congress *any person* having the ualifications enumerated in that Constitution. The power attempted to be serted by the State of Illinois in the cases before us is in direct contravention of e letter, as also of the spirit, true intent, and meaning of these provisions of the deral Constitution, and absolutely subversive of the rights of the people under at Constitution. Your committee, therefore, conclude that the said 10th sec-on of the 5th article of the constitution of the State of Illinois is inoperative the premises; that the said Trumbull and Marshall were each eligible to the fice of representative in Congress at the time of said election, it being con-ded that on that day they possessed all the qualifications for that office quired under the Constitution of the United States; and that the votes given each of them were not void, as alleged, because they were given by electors ving the qualifications prescribed by the Constitution of the United States, d at the time and place and in the manner prescribed by law.

The House sustained the report of the committee, 125 to 5.

NOTE.—A brief debate took place in the House upon the report of the committee, but the cision of the House hinged entirely upon the point presented in Mr. Bingham's report. e speeches will be found in vol. 32, part 2.
For report: Mr. Bingham, 830; Mr. Jones, 830; Mr. Norton, 830; against: Mr. Allen, 0; Harris, 865.

THIRTY-FOURTH CONGRESS, FIRST SESSION.

ARCHER *vs.* ALLEN, *of Illinois.*

Where the judges of an election had a recount of the votes, after the election, and discov-d a mistake, the committee held that the supplementary return was entitled to be received. e presumption in such a case is that the ballot boxes had not been interfered with. The ouse vacated the seat, but did not give it to the contestant.

In this case there was a preliminary report *ordered by the House*, the committee having extended the time for taking depositions without asking the thority of the House. The resolution agreed upon is as follows:

Resolved, That the chairman be directed to inform the parties in the case of the seat from Illinois, contested between Mr. Allen and Mr. Archer, that they will be permitted to take further depositions, to be returned within forty days, notice of the time and place of taking depositions to be given by each party to the other, of not less than ten days, except where it may be otherwise agreed between the parties.

The committee say:

In adopting this resolution, the committee followed many precedents of previous committees, and they believed that it was due to the parties and to the House that an opportunity should be given to take testimony to be used in the case, when both parties may be present, and the whole truth elicited and disclosed; and they came the more readily to this decision, because they understood it to be in accordance with the wishes of the sitting member, as the case appeared before the committee, and assented to by the contestant.

The final report states the facts in the case as follows:

The Committee of Elections, to whom was referred the memorial of William B. Archer, contesting the seat of James C. Allen, as representative from the seventh congressional district in Illinois, having examined and considered the same, together with the evidence presented therewith, submit the following report:

It appears from the official canvass of the votes for representative to Congress from said district, at the election held on the seventh day of November, A. D. 1854, that the sitting member received 8,452 votes, and the contestant 8,451 votes.

On the fifteenth day of December of the same year the contestant notified the sitting member that he should contest his right to a seat in this house, and that he claimed to have been himself duly elected thereto, on the following grounds:

That the returns made by the returning officers, as officially announced, are incorrect, and that the poll-books of the several counties in this district show that I received a majority of the legal votes polled in the said district for the said office, and am entitled to the certificate of election therefrom.

The sitting member, on the third day of January, 1855, replied to this notice, denying the claim of the contestant, and asserting his own right. And he now objects that the allegations in the notice were too general, uncertain, and indefinite to require any answer from him, or to lay the foundation for any proceedings on the part of the contestant. Waiving the consideration of the question, whether it is not too late, after the answer which has been referred to, to make this objection, your committee are clearly of opinion that the first specification is sufficiently certain and definite to authorize an investigation of the correctness of the returns made by the returning officers of any precinct in the district. The notice embraced all the precincts in general terms, and was as good a compliance with the law of 1851, and as serviceable to the sitting member, as if every precinct in the district had been specifically named. The law was substantially complied with. Besides, it does not appear, and it has not been suggested, that injury or inconvenience has resulted to the sitting member from any want of certainty in the notice. In the view which the committee have taken of the case, it becomes unnecessary to inquire into the sufficiency of the second specification in the notice.

The contestant having given notice, as will appear hereafter, proceeded to take depositions in support of his claim, which, with other papers, he presented to the House with his memorial at the commencement of the session. Among these papers was an official copy of a supplementary return (so called) made under oath by the judges and one of the clerks of the election of the Livingston precinct, in the county of Clark, to the clerk of the county court in and for said county, of following is a copy:

STATE OF ILLINOIS, *Clark county:*

We, the undersigned, judges and clerk of the general election in said county of Clark, and of Livingston precinct, east of Marshall, on the 7th day of November last past, 1854, do hereby certify, that, on a review and count of the ballots this day *made with care and to our satisfaction*, the ballots being on the said 7th day of November put into a box, locked and kept in the hands of one of the judges, to wit, H. H. Hutchinson, as required by law; that in the return made to the clerk of county court, we gave a certificate that William B. Archer had one hundred votes, and that James C. Allen had forty-seven votes, the said Archer and Allen being the only candidates running to represent the seventh congressional district in said State of Illinois in the Congress of the United States; that we find an error was made in said count and return, and that it *clearly appears that at said election said Archer truly received* one hundred and two votes, and said Allen got forty-six votes, (46,) *which error we now correct under our oaths taken as judges and clerk*, the other clerk, Mr Hollingshead, not being present this day, one hundred and two (102) to said Archer, and forty-six (46) to James C. Allen; all of which we hereby certify under our oaths taken and our hands and seals.

March 2, 1855.

HENRY H. HUTCHINSON. [SEAL.]
DAVID WYRICK. [SEAL.]
[SEAL.]
J. J. BIRCH. [SEAL.]

ELZA M. HANKS, *Clerk.* [SEAL.]

These facts are distinctly stated by the judges and clerk, who made the above certificate, in their depositions taken on the 9th day of March, 1855.

H. H. Hutchinson says, that after the votes were counted on the day of election, "the ballot-box, with the ballots deposited therein, was *locked up by me and kept in my possession* until the second day of March, 1855," when a recount was made; that upon the recount there were in the ballot-box "forty-six (46) votes for Mr. Allen, and one hundred and two (102) votes for Mr. Archer, *which is the correct and true vote to which they are entitled in said precinct.*"

J. J. Birch confirms the statements of Hutchinson, and says, "the ballots were put into the ballot-box, locked up and carefully kept;" and that on the re-examination, which, he avers, was "carefully made," "we found that Mr. Allen had forty-six, (46,) and no more, and Mr. Archer had one hundred and two, (102) votes, and no more; that we made a statement in writing at the time, to wit, on the 2d day of March, instant, under our hands and seals, and returned the same to the clerk of the county court, correcting the error."

David Wyrick states, as do all the witnesses who testify in reference to the election in this precinct, that the number of ballots and number of voters on the poll-list—viz., "149 ballots and 149 voters"—correspond and agree. He also states that the ballot-box was locked up and carefully kept till the 2d of March, when the re-examination took place, and that at that time they made "the whole number of votes for Mr. Allen forty-six, (46,) and no more, and for Mr. Archer one hundred and two, (102,) and no more."

Mr. Hanks, the clerk, "saw the *ballots placed safely in the ballot-box* and given to Mr. Hutchinson, one of the judges of the election, for safe-keeping." He details the proceedings at the recount, and says that Mr. Hutchinson opened the ballot-box and proceeded to call over the ballots, and in so calling he came to two ballots which, on his first impression, he considered spurious ballots, because they were neither voted for Mr. Allen nor Mr. Archer; they then laid said two votes aside, and proceeded to count the remaining ballots in the box. Then upon consultation they decided that said two votes should be granted to Mr. Archer."

Your committee saw no reason to doubt that the ballots which were taken from the box and counted on the 2d of March were the same ballots, in every respect, which were actually cast and counted on the 7th of November, 1854. The testimony upon this point is as full, clear, and satisfactory as from the nature of the case could be expected or required. In no rule or principle of

evidence, or for the weighing of evidence, of which the committee were aware, could they find authority to say that they were not satisfied beyond a reasonable doubt that the ballots had been safely and truly kept. There was no room for such a doubt as should condemn the ballots. To have assumed and acted upon the *possibility* of an alteration in them would have been an arbitrary and wanton course of procedure, unwarranted by the facts and legal presumptions in the case. It is to be noticed that the officers of election make no question whatever as to the identity and genuineness of the ballots; a doubt, even, upon this point does not seem to have occurred to any one of them. The sitting member, in his argument read to the committee in March last, raised no issue upon the identity of the ballots, nor did he suggest that any change or alteration had been made in them. The suggestion of such change or alteration unfavorable to the sitting member becomes wholly improbable, when it is remembered that the ballots were all the time in the keeping of his political friend, Mr. Hutchinson.

Assuming, then, as your committee submit they were bound to assume, that the ballots counted on the 2d of March, 1855, were the same as were counted on the 7th of November, 1854, and that in the mean time the box had not been opened or tampered with, the inference is unavoidable that in the hurry and confusion of the count upon the evening of the election there were mistakes made by the judges or clerks which were discovered and corrected upon the re-examination. It is certain that upon the recount 149 ballots were found in the box, that the names of 149 voters were found on the poll-book, and that the name of the sitting member was upon 46 only of these ballots. It is not suggested or pretended by any of the officers of election that there was any doubt whatever in regard to this statement. On a careful examination it was plain and clear to all that the name of the sitting member was on "forty-six ballots and no more." The judges and the clerk (Hanks) all certify, and all testify, that in the number of votes returned on the day of election for the sitting member they made a mistake, and they inform the House how they know it, and why they know it. How the error occurred will be examined hereafter. That there was an error, as every member of the board declares there was, in allowing to the sitting member one vote more than he actually received, your committee can have no doubt.

It further appears from the return and depositions of the officers of election, that upon the re-examination it was discovered that the contestant received two votes more than were counted and returned for him in November. The votes were "carefully examined," and the decision and deliberate judgment of the board was, that the contestant received in truth and in fact 102 votes, which ought to have been counted and returned for him. The officers of the election informed the committee that there was an error in their doings on the 7th of November; that they had discovered, and, so far as they could, had corrected it. To this information they gave the sanction of their oaths. It was the duty of the committee to examine the evidence and give it the weight to which it was legally and justly entitled, and, doing so, there was, as they think will be apparent to the House, but one result to which they could arrive, namely, that the error was *proved*, and that it ought to be corrected.

Thus stood the case as it was originally presented to your committee. The sitting member, however, objected that the depositions by which the foregoing facts were established were taken without the notice being given to him which was required by the act of Congress of 1851.

The notice citing the sitting member to attend to the taking of depositions on the 9th day of March, 1855, was dated February 20, 1855, and was immediately forwarded to Washington, where the sitting member then was, for service. It was seasonably received by the gentleman to whom it was sent—a colleague of the sitting member in the 33d Congress; but, through some acci-

dent or inadvertence, as the committee are informed by a member of the late House of Representatives and of this, and who was cognizant of the facts, the service was not made until the 28th of February. Construing the act of 1851 by the equity and spirit, if the committee may so say, of the well-established rule of law, that, in the computation of time, the day upon which an act was done, or a notice given, is to be excluded or included, as may be necessary, to prevent an estoppel, or save a forfeiture, the notice may be regarded as sufficient within the terms of the law. But the act itself was directory and cumulative. Its object was to protect, and not to defeat, the rights of contesting parties and of the people. It was to be an aid, and not an obstruction. To reject testimony taken under such circumstances as this was, and for the reasons urged by the sitting member, and thus to deprive a contestant, though guiltless of laches, of his clear and indisputable rights, and to deprive the people of a congressional district of theirs, would be unreasonable and unjust, in violation of the spirit, if not of the letter, of the law of Congress, and an abdication by the House of its constitutional duties and functions.

In addition to what has been said, it may be observed that the facts stated in the depositions objected to appear in the copy of record to which reference has been made, and which, if properly admissible, furnishes plenary evidence of the facts relied upon by the contestant.

The sitting member stated to the committee that, in point of fact, he had no opportunity to be present, either in person or by counsel, at the taking of the depositions; and further, that if he could have been present, and had an opportunity to examine the witnesses, he would have made no objection to the sufficiency of the notice. In the same spirit by which your committee were controlled in their decision to receive the depositions introduced by the contestant, and solicitous only that the whole truth should be made known, and such determination of the case had as would do exact and perfect justice to the parties, they did not hesitate to adopt a resolution, under which ample opportunity would be afforded the sitting member and the contestant to examine the witnesses whose depositions were before the committee, as well as others, and thus giving to the sitting member opportunity to cross-examine the witnesses whose testimony he objected to solely for the want of such opportunity. And the committee the more readily adopted the resolution, so just and equitable to the parties, from the fact that they understood that such action was in accordance with the wishes of both. The contestant had, in conversation with the committee, expressed himself to that purpose; and the sitting member, in his written argument, before referred to, made use of the following language:

> It is no answer to these objections to say that these judges and clerks, in their depositions taken on the 9th of March, testify that the examination which took place on the 2d was in all things properly conducted, and that the ballots had been carefully preserved, &c.; for those depositions were taken without that notice to me which is required by the 9th section of the act. It is true that the contestant attempted to give me notice, but it reached me within the ten days required by law, and too late for me to attend in person or by agent. And while I do not conceive that the depositions contain in themselves anything that could warrant the committee in setting aside the official returns, and annulling my commission under the great seal of the State, *I respectfully but earnestly urge the committee, if they should regard it differently, not to do so upon testimony taken without such notice as would be required in a matter where a few dollars, or even cents, was in controversy.*

Upon the 14th day of April last, in pursuance of the aforesaid resolution of the committee, the contestant, having given due notice to the sitting member, proceeded to take the depositions of Hutchinson and others, who had testified before, and also of the clerk, Hollingshead, who was not present at the recount in March, 1855. These depositions state more in detail than the former what took place on the day of election, and at the re-examination in March, and explain very satisfactorily how the error on the first count occurred. They also contain a particular statement of a third counting of the ballots (which had been care-

fully preserved) on the 14th day of April last, and upon which they came to the same result as on the second. Among the depositions recently taken are those of all the judges and clerks for the Livingston precinct, of whom three, to wit, Messrs. Hutchinson, Wyrick, and Hanks, are political friends of the sitting member, and two, Messrs. Birch and Hollingshead, are political friends of the contestant.

The evidence in the case is here presented. The committee conclude:

Your committee have, upon this testimony, arrived without difficulty at these results:

Firstly. That one more vote was returned for the sitting member than he actually received at the polls.

Secondly. That the ballots were kept safely and without alteration until the 2d of March, 1855, when they were counted again by the officers of election.

Thirdly. That upon this examination it appeared that two votes probably, and one certainly, were thrown for the contestant more than were counted and returned for him on the day of the election; and hence,

Fourthly. That the contestant was elected by a majority of one or two votes.

So, whether the question is to be determined upon the evidence first introduced, and excluding that subsequently taken, or upon the latter alone, or upon all that has been presented, your committee are satisfied that the contestant was legally and truly elected.

The committee reported the subjoined resolutions:

Resolved, That James C. Allen was not elected, and is not entitled to a seat in this house.

Resolved, That William B. Archer was elected, and is entitled to a seat in this house.

The minority of the committee in their report object to the alteration in the original return from the Livingston precinct.

First, as to the admissibility of the testimony produced, by which the alteration is sought to be made; and, secondly, the effect of the testimony even if received.

And on the first head they would say, in the first place, no allusion to any such error in the count at the Livingston precinct is made in the original notice given by Mr. Archer, the contestant, to Mr. Allen, the sitting member, of his intention to contest the seat under the act of 1851. This will be seen by reference to exhibit A. The only specification in that notice is in these words: "That the returns made by the returning officers, as officially announced, are incorrect, and the poll-books of the several counties of this district show that I received a majority of the legal votes polled in the said district," &c. This notice is without any *particular specification*. It is almost, if not quite, as *general* as it could possibly be made. But by the law of Congress, passed February 19, 1851, under which these proceedings were instituted, and by which it seems to us the investigation should be governed, it is provided in section 1, "That from and after the passage of this act, whenever any person shall intend to contest an election of any member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice in writing to the member whose seat he designs to contest of his intention to contest the same, and in such notice shall specify particularly the ground upon which he relies in the contest." The notice of the contestant was within the time required by law, but contained no reference whatever to this *particular ground now insisted upon*. It was almost as vague and indefinite as if it had simply notified the sitting member that the contestant intended to claim the seat upon the grounds that he was duly elected and the sitting member was not. If he had at that time intended to insist upon a recount of the ballots at the Lexington precinct, was he not bound, under the law, to make the particular

cation? Thirty days were allowed him to prepare all his grounds. This Lex-
precinct affair seems to have been an afterthought. It was not alluded
he notice, and if we are to be governed by the law of Congress the inves-
n should be confined to the grounds particularly set forth in the original
. The law of Congress we do not regard as merely directory or cumu-
but as peremptory and binding in its import and intention, as any other
gulating any other judicial proceeding. The House, in judging of the
n returns of its members, sits as a court. Their proceedings are judicial
ir character, and why is it not as competent for Congress by law to regu-
e proceedings in this court as in any other? And if such regulations are
why are they not as binding? This is an important point; and the under-
insist upon the propriety of its observance by the House, not so much in
eration of any bearing it may have on the merits of this case, as on ac-
of the consequences which will naturally follow the precedent which a dis-
of it would establish. It would amount, in their opinion, to nothing short
ractical repeal of the statute in this particular. Nor do we think the force of
oint is at all weakened by any act of the sitting member in his answer to the
l notice given him. In that answer he simply joins issue on the grounds
ted, as they stood stated under the law, and on that issue he still stands.
ther reason why the testimony touching this recount should not be allowed,
opinion of the undersigned, is, that it was taken without due or legal
to the sitting member. This will be seen from exhibit D. The law of
ess required at least ten days' notice; but the notice was served on the
member in the city of Washington on the 28th of February, 1855; and
ne for taking the testimony designated the 9th day of March thereafter,
e place, the State of Illinois. The time was but nine days, and the dis-
so great that he could neither be present in person nor by attorney; the
dings, therefore, were entirely *ex parte*. Besides this, there is still another
. The testimony relates to a recount of the votes in the ballot-box, which
ade on the 2d of March, 1855, nearly four months after the election,
t any notice at all to the sitting member, without his having any knowl-
hatever of such recount being intended; and the recount itself was made
t any authority of law whatever. For these reasons, the undersigned
the opinion that all the evidence relating to this recount should be rejected,
e poll at the Livingston precinct left as it originally stood.
secondly, as to the effect of the testimony, in case it be received: The
igned are not of opinion that it authorizes the correction now sought to
le. In the first place, on this view the evidence is not such as to preclude
sonable doubt that the ballot-box might have been improperly interfered
nd the ballots in some way altered or changed, from the 7th November,
y of election, to 2d of March, the day of the recount. There was no law
State authorizing or requiring it to be kept safely with the ballots in it,
uiring the preservation of the ballots in any way; and although the
es state that after the count on the evening of the election on the 7th of
ber, 1854, the ballots were all put back into the box, and the box locked,
t in charge of one of the judges of election, who swears that it was not
. from then until the 2d of March, to the best of his knowledge; yet the
ny taken altogether is not sufficient to show that the box might not, in
erval, have been opened; and on a very material point in it—that is, the
ion of the key—the testimony, so far from being "consistent" and con-
, as the majority deem it is, the undersigned consider it not only unsatis-
, but essentially conflicting, if not directly contradictory. For Mr. Hutch-
the judge who took charge of the box, in answer to a question about the
sion of the box and key from the 7th of November, 1854, until the
ting on the 2d of March, 1855, says: "They were both in my possession.
ey was my own private property; and after the box was locked, the other

judges had left the house where the election was held. The key that belonged to the ballot-box was lost." While Mr. Birch, another one of the judges, says: "We put the ballots into the ballot-box and locked it up. I do not remember who took the box. I took the key and put it away, and never have seen it since; but *think* that H. H. Hutchinson took the ballot-box." From this it would seem clear that there were *at least two keys* that would unlock the box. Now, why may not the key taken by Mr. Birch, and which he has never seen since, have been used in perpetrating a fraud on the ballot-box without any privity or knowledge either on his part or that of Mr. Hutchinson? Does not the evidence show clearly the *possibility* of such a result? Is it of such a nature as to preclude such a possibility? We think not. And, upon *principle*, believing it would be dangerous and utterly destructive to the sacredness and sanctity of the elective franchise, and those guards by which it is to be legally protected, to establish a *precedent* of allowing alterations in original returns to be made upon testimony of this kind and nature, we think the correction now sought to be made upon the evidence produced should not be allowed; the testimony, if received, is not of such a character as to warrant such a conclusion.

But again, and apart from these considerations, the undersigned are clearly of opinion that if all these irregularities be passed over, and the recount be allowed by the testimony adduced, the result is different from that claimed by the majority. If there were really and in truth three tickets rejected at the first count on election day upon the grounds that the names of both the contestant and sitting member were erased from them, and consequently were not counted for either; and if the three tickets or ballots appended to the testimony, marked exhibit P, be in truth and in fact the same *identical ballots* so originally rejected, the undersigned are clearly of opinion that the action of the board in rejecting *all three of them* on the day of election was right, and that *neither of them should now* be counted either for the contestant or the sitting member. The majority of the committee think that two of them ought to be counted for the contestant, making his poll at the Livingston precinct 102 instead of 100, as it originally stood. This is a matter, if the House goes into the inquiry, to be settled by inspection.

The House voted that Mr. Allen, the sitting member, was not entitled to the seat—94 to 90; but rejected the second resolution declaring Mr. Archer elected—yeas 89, nays 91. The Speaker was directed to inform the governor of Illinois that a vacancy existed in the seventh Congressional district of that State.

NOTE.—The debate in the House was confined to the points stated in the reports. The speeches upon the case will be found in volume 33.

For the report: Mr. Archer, page 933; Mr. Washburne, page 923, 954; Mr. Norton, page 1022. Against: Mr. Allen, page 924; Mr. Harris, page 929; Mr. Millson, page 931; Mr. Stephens, page 932.

THIRTY-FOURTH CONGRESS, FIRST SESSION.

MILLIKEN *vs.* FULLER, *of Maine.*

Where it was alleged that municipal officers conducting an election were not elected in strict compliance with the law of the State—held, that as no fraud was alleged, the persons officiating were officers *de facto*, and the election was valid.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 10, 1856.

Mr. SPINNER, from the Committee of Elections, made the following report: That they have passed over and have not decided upon the claims of either

party to be allowed the votes given, or returned to have been given, for J. D. Fuller and for Thomas Fuller for the sitting member, and the votes returned for James Milliken for the contestant; for the reason that, whether so allowed or not, the result would not thereby be changed, unless—

First. That votes from "plantations organized for election purposes only," from which lists of the voters were not returned to the office of the Secretary of State, as is contended the law required *as a condition to being allowed*, be rejected; or,

Second. That the votes of Hancock plantation be rejected, because the officers who held the election were chosen at a meeting held in the *month of April*, when, as the contestant contends, the law of the State required that it should have been held in the *month of March*.

There is no controversy about the facts in either case, and, although there was difference of opinion in the committee, whether the election of municipal officers in the Hancock plantation was held *at a time permitted by the law of the State*, yet the committee is unanimously of the opinion that the persons officiating were officers *de facto*, acting in good faith; and, as no fraud is alleged, the votes from the district were rightfully counted for the sitting member.

In regard to the returns from "plantations organized for election purposes only," the members of the committee were, as were the governor and council of the State of Maine before them, divided in opinion, and are not prepared to say what conclusion they would have come to in the case, had this been an original question; but, inasmuch as contemporaneous constructions by the State canvassers have recognized the returns from these plantations, and that they have received and counted them as valid, notwithstanding the list of voters was not returned with the number of votes cast; therefore, under the circumstances, the committee do not feel authorized, whatever the opinion of some of its members may be of the effect of a non-compliance on the part of the plantation officers with the plain requirements of the law, to exclude the votes of these plantations.

The committee are unanimous in the opinion that Mr. Milliken had good and sufficient cause to contest Mr. Fuller's seat, and that deference to the opinions of large numbers of persons in his district required him to undertake and prosecute the contest; and that he should therefore receive compensation from the day on which his memorial was presented to the House.

In accordance with these conclusions, the committee unanimously report the following resolutions:

Resolved, That Thomas J. D. Fuller is elected to, and rightfully entitled to, his seat in the 34th Congress.

Resolved, That James A. Milliken, the contestant, be paid the usual mileage and daily compensation from the 3d day of March last to this day.

The House, without debate or division, adopted the first resolution.

THIRTY-FOURTH CONGRESS, FIRST SESSION.

OTERO *vs.* GALLEGOS, *of New Mexico Territory.*

Where Mexican citizens elected to retain their Mexican citizenship, though inhabitants of United States territory—held, that they could not vote for a delegate to Congress.

Where a probate judge annulled a precinct election—held, that it was not necessary to inquire into his powers, as the House of Representatives has the power to revise his action.

Where the vote is by ballot the election judges cannot deprive the elector of his right of secrecy; and when it is done it tends to vitiate an election.

IN THE HOUSE OF REPRESENTATIVES,

MAY 10, 1856.

Mr. W. R. SMITH, from the Committee of Elections, made the following report:

The contestant, Miguel A. Otero, claims the seat now occupied by the Hon. José M. Gallegos, upon eleven specifications as set forth in his memorial to Congress; the most important of which your committee have examined in connexion with the testimony. The first question is presented in the following words by the contestant:

1. Under the eighth article of the treaty of peace between the United States and the republic of Mexico, proclaimed July 4, 1848, among other things it was provided that "those Mexican citizens who shall prefer to remain in the said territories may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States, but they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories after the expiration of the year without having declared their intention to retain the character of Mexican citizens shall be considered to have elected to become citizens of the United States."

The said contestant avers that,

In the county of Santa Fé, in precincts numbers one, two, three, four, five, six, seven, and eight, eight hundred voters who had elected as aforesaid, under said treaty, to retain the title and rights of Mexican citizens within one year from the ratification of said treaty, and who were not American citizens, and who had no right to vote, and who were disqualified from voting by the decision of the supreme court of New Mexico—which decision is unreversed and unappealed from—and who were also disqualified by the thirty-eighth section of the election law of said Territory, did, at said election, on the third day of September, 1855, in said precincts in said county, cast for you illegal votes to the number of eight hundred, which votes should be rejected, and not counted in your favor, but were counted for you as legal votes.

2. In the county of Rio Arriba, in precincts numbers one, two, three, four, five, six, seven, and eight, six hundred illegal votes of Mexican citizens having no right to vote were polled and counted for you when they should have been rejected.

3. In precincts numbers one, two, three, four, five, six, seven and eight, in Santa Fé county, minors and Mexican citizens, and persons not entitled to vote, to the number of five hundred, illegally voted for you, and said votes were counted for you, and they should have been rejected.

In referring to the treaty of peace between Mexico and the United States, your committee find the 8th article of said treaty to be in the words as above set forth by the contestant. (U. S. Statutes at Large, vol. 9, page 929.)

The organic law of the Territory (U. S. Statutes at Large, vol. 9, page 449) provides that "the right of suffrage shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty." The election law of the Territory, in sections 19, 21, and 28, expressly confines the *right of suffrage to citizens of the United States*, and declares heavy penalties against "*any Mexican citizen*" who shall vote.

But it is contended by the sitting delegate, through his counsel, "that it is a conclusive answer to this that no notice was given of the particular voters intended to be impeached on this ground."

Your committee think that the notice was quite sufficient to authorize the taking of the testimony. No such objection was made by the sitting member or his counsel at the time of taking the depositions. On the contrary, he appeared and cross-examined the witnesses without any objection whatever; and if he had had no notice at all, but had appeared and cross-examined, he would have been estopped from setting up the want of notice.

But the sitting delegate, through his counsel, says, further, in substance, that the manner in which the said Mexican citizens elected to remain Mexican citizens, under the 8th article of the treaty above referred to, was not sufficient in law to make them illegal voters; that it required an act of Congress to constitute the tribunal to receive the declaration and to prescribe the mode of making it.

No act of Congress has ever been passed prescribing the mode of making the "election to remain as Mexican citizens." Your committee, for many reasons, think that no act of Congress was necessary. If an act had been necessary, the neglect of Congress to pass such an act would amount to an abrogation of that clause of the treaty, because the time of making the declaration is limited to "one year from the date of the exchange of the ratifications of this treaty." The treaty, in the 8th article, conferred upon Mexican citizens the right to retain that citizenship by making a declaration to that effect, but required them to do it within one year; and it will not be seriously contended that the failure of Congress to provide a particular mode of making that declaration would deprive the citizens of so important a right, secured to them in so solemn a form as a treaty stipulation. It will be remembered that citizens of this Territory were, at the time, citizens of Mexico, and the treaty did not intend to make them American citizens without their own consent. It would be a mere mockery to say that they had the right to retain the character of Mexican citizens, and yet could not do so, because no mode of doing it had been prescribed by law.

As this is an important point in this case, your committee deem it due to the House to show the precise manner in which the "declaration" was made.

The military governor of the Territory, Colonel Washington, in pursuance of the eighth article in the treaty, issued a proclamation in the Spanish language, of which the following is a translation:

"*To the people of New Mexico.*

"Whereas, by the eighth article of the late treaty of peace, friendship, and limits between the United States of America and the United Mexican States, the inhabitants of the territories ceded to the United States are required to declare their intentions to remain citizens of the Mexican republic within one year, reckoned from the date of the ratification of the treaty; and those who remain in the said territories after the lapse of one year, without having declared their intentions to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States; and whereas the year, reckoned from the ratification of the treaty, will expire on the thirtieth of next May; and as it is desirable, for the unembarrassed action of the government, that it should be publicly known who, at that time, shall have become entitled to the rights and privileges, and shall have made themselves subject to the duties of citizens of the United States—

"Therefore, I, John M. Washington, governor of the Territory of New Mexico, do hereby direct that there shall be immediately opened in the prefectures of the several counties of the Territory, by the clerks of the courts of the prefectures, registers of enrolment as follows: '*We elect to retain the character of Mexican citizens.*'

"And those who in each county shall elect to do so, may personally register their names; and those who do not appear and sign said declaration on or before the thirtieth of next May shall be, in accordance with the treaty, considered citizens of the United States.

"Within six days after the thirtieth of May the registers shall be sent with the certificates of the clerks of the prefectures of the several counties to the secretary of the Territory, in order that they may be by him published and distributed to the several tribunals of justice in the Territory.

"Given under my hand and seal at Santa Fé, the twenty-first of April, eighteen hundred and forty-nine.

"J. M. WASHINGTON."

Under this proclamation many Mexican citizens made the declaration, and retained their "Mexican citizenship," according to the aforesaid eighth article of the treaty.

Your committee are of opinion that, in the absence of any congressional enactment, the governor of the Territory was the proper person to designate the tribunal and to prescribe the mode of making the declaration; and that any declaration made in good faith, under the foregoing proclamation, is legally valid in all essential respects. Colonel Washington was the agent of the government, and his proclamation was a public act, which Congress will notice without formal proof of its issuance, although it is shown by the witnesses, [see printed testimony in this case, page 22,] that the Mexican citizens acted in pursuance of Governor Washington's proclamation.

Accompanying the depositions is the original book opened and kept by the clerk of the prefect court of the county of Santa Fé, identified and marked as an exhibit, upon which appear the names of many of the persons who are alleged as having illegally voted for José M. Gallegos.

At the commencement of this book is a declaration, in both English and Spanish, as follows:

"*We elect to retain the character of Mexican citizens.*"
"Nostros elejimos retener el caractar de ciudadanos Mexicanos"

Following the list of signatures to this declaration is the following certificate:

"TERRITORY OF NEW MEXICO,
"*County of Santa Fé:*

"I, James M. Giddings, clerk of the prefect court, do hereby certify that the foregoing is a correct list of all who have elected in said county to retain the character of Mexican citizens.

"Given under my hand and seal this 1st day of June, 1849.

"JAMES M. GIDDINGS, *Clerk.*
[L. S.] "By T. B. GIDDINGS, *D. C.*"

This proceeding was a substantial compliance with the provisions of the treaty, and a literal execution of its terms. The men who subscribed that declaration, or who authorized their names to be subscribed, declined to acquire the rights of American citizens, and cannot now acquire that citizenship except by the process of naturalization under the laws of the United States. They had the option; and having made their choice, they must submit to the consequences. Your committee are of opinion that all such persons as elected under the treaty to retain the "character of Mexican citizens" are, and were at the time, unnaturalized foreigners, and as such, having no right to vote, their votes ought to be rejected.

The evidence of the making of the declaration, and that some of the declarants voted for the sitting delegate, is not conclusive; but it is quite sufficient, in the opinion of your committee, to throw the *onus probandi* upon the sitting delegate.

The report proceeds to cite portions of the evidence in the case going to show that 143 votes were given in Sante Fé county by persons who had signed the declaration, and that all these votes were given for the sitting delegate. The report proceeds:

The next point relied on by the contestants is found in the following specification:

9. In precinct number ———, at Mesilla, in the county of Doña Ana, votes to the number of three hundred and twenty-nine, which were illegal, fraudulent, and void, were counted for you by the secretary of the Territory of New Mexico, when they should have been rejected, for the following reasons: First, because the poll-books for said precinct, by the probate judge of said county, were not used at said election, by the unlawful interference of the priest at Mesilla; second, because there was but one poll-book kept at said precinct; third, because votes to the number of one hundred were illegally received for you after six o'clock on said day; fourth, because one hundred and ninety-six votes, placed in the ballot-box of said precinct for me, and which should have been counted for me, were not counted for me, but remained in said ballot-box uncounted; fifth, because the judges of said election at said precinct, appointed according to law, were not permitted to serve, and others, without being sworn according to law, or entitled to act as judges, did act as judges of said election at said precinct; sixth, because at the time of counting the votes of said county before the probate judge of Doña Ana county, William Claude Jones, a citizen having the right to question the legality or illegality of said votes, did then and there question, before the probate judge of said county, the legality of all the votes polled at said precinct, and the said votes, numbering four hundred and one, of which you received the number of three hundred and twenty-nine votes, were adjudged illegal, fraudulent, and void, by the said probate judge of said county, and should not have been counted for you by the secretary of the Territory of New Mexico, but were illegally counted for you by him.

This specification gives rise to the necessity of examining the acts of the territorial legislature of New Mexico on the subject of elections; and the following clauses of said acts are deemed important in elucidating the facts:

SEC. 10. The probate judges shall cause two poll-books to be made for each precinct in the manner prescribed in the following section, and shall forward them to the judges of the election on the day they are notified of their appointment.

SEC. 11. It shall be sufficient for the poll-books to contain, in substance, as follows:

Poll-book of the election held on the ——— day of ———, 18—, in the precinct of ———, in the county of ———, for the election of ———. This certifies that the judges appointed were sworn according to law; signatures of the persons taking the oath; names of voters; names of persons voted for.

The polls being closed, the number of votes received by each candidate shall be added up at the foot of each column.

CERTIFICATE.

We, the undersigned, judges and clerks of elections held on the ——— day of September, 1851, in the precinct of ———, in the county of ———, certify that, having counted the votes polled for the respective candidates in said election, the result is as follows: A received ——— votes for the office of ———. Mr. B received ——— votes for the office of ———. Mr. C received ——— votes for the office of ———. O., &c. Here the names of the judges who signed; and here sign the clerks, Z. O. ———, who are H. Y.

SEC. 12. The judges of the election, before entering upon the discharge of their duties, shall take an oath for [before] any judicial authority, or shall swear each other mutually in the following manner: I, ——— ———, swear impartially to discharge the duties of judge of the present election according to law and to the best of my knowledge: so help me God.

SEC. 13. Said judges shall appoint two clerks, who, before entering upon the discharge of their duties, shall take an oath before one of the judges of the election, faithfully to record the names of all the voters, and impartially discharge their duties as clerks of the election.

SEC. 15. If any probate judge should fail to appoint the judges provided by this act, or if from any cause they shall fail to attend at their respective precincts on the day of the election, it shall be lawful for a majority of the qualified voters in the precinct where said vacancy occurs to appoint judges, who shall conduct said election in the same manner and to the same effect as if they had been appointed by the judge of probate, as provided in this act.

SEC. 16. The polls shall be open from nine o'clock a. m. until six o'clock p. m., without adjourning, unless by consent of the people. After closing the polls the votes shall be counted in public by the judges, with the assistance of the clerks, *one of whom shall take one of the poll-books*, without delay, to the probate judge, in whose office *one of the poll-books shall remain for the public inspection of any person whatsoever.*

SEC. 17. Within six days after the election, the probate judge shall call to his assistance one of the justices of the peace of the county, and publicly examine and count the votes polled for each candidate, giving notice thereof two days previous, which notice shall be posted up at the court-house for the information of the people, where the examination is to be held, *and any citizen* shall have the right to question the legality or illegality of any vote.

SEC. 22. All votes shall be by ballot, each voter being required to deliver his own vote in person. Each ticket shall be numbered and the number placed opposite the name of the voter; said tickets shall in no case be *examined*, unless the election be contested, but shall be delivered by the judges of the election to the probate judge of the county, who shall retain them until the expiration of the time allowed for the contesting of the election, and they shall then be destroyed.

As connected with these laws, we will examine the facts.

The judges of election were not sworn, as required by section 12, above quoted.

The proof of this fact is found in the deposition of Richard Campbell, probate judge of the county of Doña Ana, (page 40 of the printed testimony,) where he says "two sheets of one of the poll-books were returned to me with *the oath and certificate not signed.*

At page 42 of the printed testimony will be found a transcript of the judicial action of the probate judge, annulling the election at this precinct, for the reason stated, as well as for other reasons. It is not necessary to inquire into the powers of the judge of probate in annulling the vote at this precinct, for the House of Representatives has undoubtedly the right to revise this act of the probate judge; and hence we must look to facts as we find them in the testimony, in order to determine whether or not this vote should be rejected. The only use we have for the decree of the probate court is to inquire into it as evidence, as far as it goes.

This judgment, which will be found on page 42 of the printed testimony, is as follows:

EXHIBIT A.

FRIDAY, *September* 7, 1855.

Court met pursuant to adjournment.

In pursuance of the order of the probate court, dated Tuesday, the 4th instant, this day was set apart for the examination of the votes polled at the election held on the 3d instant. Having called in the assistance of Thomas J. Bull, justice of the peace for Las Cruces precinct, the court now proceeds to examine and count the votes, commencing with the precinct of La Mesilla; and it appearing that there was but one poll-book made out by the judges and clerks of election precinct, W. C. Jones files a motion to reject and annul the election of said precinct; and it appearing, upon further examination, that there were one hundred and ninety-five votes within the ballot-box which were not numbered and not down on the poll-books, which number of votes appearing to be all on one side, gives it greatly the appearance of fraud; and further, that the certificate showing that the judges appointed were sworn according to law, was not signed as the law directs; and further, that they refused to use the poll-books furnished and made out in proper form according to law; that they made out others which were not in form as required by law; therefore it is hereby ordered and decreed by this court, that the returns from said precinct of Mesilla be, and the same are hereby, rejected and annulled on account of illegality of same, and evident fraud on the part of judges, clerks, or other persons having to do at the polls of said election.

R. CAMPBELL, *Probate Judge.*

The 11th section of the election laws, herein above referred to, gives the form of certificate which shall be at the head of the poll-books and signed by the judges; and this form includes a certificate that the judges were sworn. This certificate signed would be legal evidence of the fact that the judges took the requisite oath; but in the present case it is absolutely wanting. It is not insisted that no other proof could be admitted to establish the fact that the judges were sworn; but in the absence of the proper legal certificate, and of all other evidence of the fact, it must be admitted that this essential requisite of the law has not been complied with.

In the case of Draper *vs.* Johnston, (see Contested Elections, page 710,) the following rule was laid down:

When such oath is required it will be presumed to have been taken, unless the contrary appears, and the *onus probandi* will be thrown upon him who alleges the omission of it: but, as the law of Virginia requires a record of the oath to be made in the clerk's office, a certificate from the clerk that it has not been filed may be sufficient to shift the burden of proof upon the other party.

Instead of the certificate of the clerk that the oath is not recorded, we have in this case the testimony of the judge of probate that the certificate was not signed; and we also have his judicial decree annulling the election at that precinct, containing as one of the reasons that the certificate and oath of the judges was not signed.

If the judges of the election at Mesilla precinct had taken the requisite oath, the fact could have been proved by the judges themselves. The neglect to prove this on the part of the sitting delegate strengthens the supposition that they were not sworn. The action of the probate judge was public, and the legality of the election at that precinct was openly impeached by W. C. Jones, under the 17th section of the territorial law; and the neglect of the judges of election to be sworn is especially referred to in the notice.

Your committee are not satisfied that the judges were sworn, and they refer the House to the uniform rule, as heretofore acted upon by the House.

In McFarland *vs.* Culpepper, (Contested Elections, page 221,) it was decided that "the neglect of returning officers to be sworn when the law requires them to act under oath will vitiate all returns made by them."

In Draper *vs.* Johnston, (Contested Elections, page 702,) it was decided that "the neglect of the election officers to take the oath required by law will vitiate the poll for the county or precinct in which such officer acts."

In Easton *vs.* Scott, (Contested Elections, page 272,) it was decided that

"when an election is required to be held by *three* who are to be sworn, and it is held by *two* who are not sworn, their proceedings are irregular, and the votes taken by them are to be rejected."

The other irregularities and illegalities at this precinct were very great.

The probate judge, as required by law, furnished the poll-books for this precinct in due and proper form, as will be seen from his deposition, on page 39 of the printed testimony. They were rejected by the judges of election, and others substituted which did not contain the requisite certificates, either in form or in essential substance.

The law requires *two* poll-books to be kept—one to be sent to the secretary of the Territory, and the other to be retained by the probate judge. In this case only one was kept, and that was deficient in form and substance, and was upon loose sheets of paper, which gave every opportunity for fraud and unfairness.

Two clerks are to be appointed and sworn; and it may well be presumed that they are expected to act as a check, the one upon the other. At the Mesilla precinct this important function was not performed. There were two clerks; but it does not appear that they were sworn, and they did not pretend to keep more than one poll-book, and that upon loose sheets of paper, which might be abstracted or altered.

By section 22 of the election law herein above quoted it is enacted that "*all votes shall be by ballot*, each voter being required to deliver his own vote in person. Each ticket shall be numbered, and the number placed opposite the name of the voter; said ticket shall in no case be examined, unless the election be contested." It is apparent that the law intended to give the voters the advantage of secrecy in depositing their suffrages, with a positive prohibition against violating this secrecy, except in case of a contest between the rival candidates. The voter was by law entitled to the protection of the ballot, and the judges had no right whatever to deprive him of that protection by crying out his vote as it was deposited in the box.

In the case of Eaton *vs.* Scott (Contested Elections, page 272) the following ruls were acted upon:

When votes are given by *ballot*, an elector cannot be compelled to disclose the name of the candidate for whom he voted.

If votes are required by law to be given by ballot, *viva voce* votes ought not to be received.

In the case before us, Bartolo Madrid (printed testimony, page 56) testifies as follows:

Sixth question. As the tickets were handed in by the voters, were they opened and "cried out," and then registered, or were they put into the box and afterwards taken out, "cried out," and registered?

Answer. As the tickets were handed in, the president of the election took them and opened them, and "cried them out;" the number and registry was then made, the ticket again doubled and put into the box by the president, and were not taken out and counted by the judges and clerks.

Your committee are of opinion that this irregularity violated the sacred right of secrecy belonging to the voter. The arrogance of an election president or judge, in assuming and exercising the right to open and proclaim a ballot in presence of the elector as he handed in his vote, is equal to compelling the elector to disclose the name of the candidate for whom he votes. It seems to your committee that, if the testimony of Madrid is to be credited, this proceeding amounted to a *viva voce* election.

The report further states:

"Your committee have found, in examining this testimony, the following among other important facts:

"That the secrecy of the ballot was violated by the act of the judge, in crying out the votes in the presence of the voters as they handed in their tickets.

"That the officers of the election were not sworn.

"That a bystander, one Escarate, who was neither a judge nor a clerk, was allowed to take the tickets, as handed in by the voters, and write upon them, and then hand them to the judges.

"That the poll-books, as furnished by the judge of probate, according to law, were rejected by the judges and others, on loose sheets of paper, substituted and used.

"That 192 ballots were found in the box not numbered or registered, and it is alleged that one of the judges connived at and assisted in this fraud.

"The election at the Mesilla precinct is so surrounded with fraud, irregularity, illegality, and mystery, that a majority of your committee recommend that the votes in that precinct be rejected.

"Your committee having thus concluded that the seat ought to be given to the contestant, feel it due to themselves to state that they have examined all the points of defence as presented by the sitting delegate, and they find nothing to change their conclusion."

In the precinct of Chamisal the sitting delegate charged that 160 legal votes were fraudulently abstracted from the ballot-box, and the same number of illegal votes put in for the contestant. The committee refused to receive the evidence of this fraud, as notice was given that it would be taken before the chief justice of the Territory, whereas it was taken before a judge of probate. The report concludes:

But it may well be questioned whether such testimony as this ought to be received to invalidate an election. It would be productive of unending frauds and perjuries to permit parties to come forward, after an election by ballot, and swear that they voted differently from what the ballots themselves exhibit. Especially must this principle apply under the system adopted in New Mexico, where every ticket is numbered, and the number also recorded in the poll-books opposite to the name of the voter. The only proof which ought to be admitted to establish a fraud such as that charged in this case, would be to show, by affirmative testimony, that the judges, clerks, or some other persons actually withdrew the tickets given by the voters and substituted others for them. Until this shall be shown, the oath of the voters should not be received to contradict the record and the ballots themselves. The very nature of the ballot renders this principle a necessity; otherwise, every election might be tried over a second time by the oath of the voters instead of the ballots deposited in the boxes in the presence of the officers and of the public.

In the case of Van Rensselaer *vs.* Van Allen, (Contested Elections, page 76,) your committee find the following remarks, setting forth the principles which seem to have been acted on in that case:

"The petition stated that numbers of persons had sworn that they had voted for the petitioner, whose votes, by the returns, it does not appear were counted. On this it was observed that the committee did not consider this allegation of a nature proper to engage their attention. It was presumed that the House of Representatives would never institute an inquiry into such a species of evidence. It was extremely difficult for a man to swear that he had positively voted by ballot for a particular candidate, since it is well known that persons had, on such occasions, frequently put in a ballot for the person they had not intended to vote for. In the hurry and confusion which often take place the ballots get shifted, and one is put in in lieu of the other."

Even then admitting, for the sake of argument, that the testimony had been properly taken according to the notice, your committee would hesitate long before recommending the House to attach any importance to it, or to admit so dangerous a precedent.

It appears that Gallegos's majority, upon which his certificate was awarded, was	99	votes.
Your committee find of Mexican votes cast for Gallegos, which they think ought to be rejected	131	
This gives Otero a majority of	32	
Of the votes counted for Otero at the Mesilla precinct there were 72.		
Of the votes counted for Gallegos at the Mesilla precinct there were.	330	
Deduct	72	
Leaves	258	
	32	
This vote being rejected, leaves Otero's majority	290	

Upon this state of facts your committee recommend the adoption of the following resolutions:

Resolved, That José M. Gallegos is not entitled to a seat in this body as delegate from the Territory of New Mexico.

Resolved, That Miguel A. Otero is entitled to a seat in this body as such delegate.

The House agreed to the resolution of the committee without a division.

NOTE.—The only arguments in this case in the House were made by the sitting member and the contestant upon the points made in the report.

THIRTY-FOURTH CONGRESS, FIRST SESSION.

REEDER *vs.* WHITFIELD, *of Kansas.*

There were two contests in the House upon this case. The preliminary one was upon the question of authorizing the Committee of Elections to send to Kansas for persons and papers. The contestant denied the validity of the election law under which the incumbent obtained his certificate, on the ground that the legislature which passed it was imposed upon the people of Kansas by a foreign invading force. The incumbent denied the facts, and contended, even if they were true, that the contestant was estopped from pleading them, because he, as governor of Kansas Territory, gave the certificates to the members of the legislature. The committee and the House held that full power should be given to send for persons and papers. The second contest was for vacating the seat. The committee and the House held that the election laws of Kansas were nullities, and that Mr. Whitfield was elected without authority of law.

A preliminary report was made in this important case. It is given in full below:

IN THE HOUSE OF REPRESENTATIVES,

MARCH 5, 1856.

Mr. HICKMAN, from the Committee of Elections, made the following report:

The relative position of the contesting parties, and the disputed questions of fact, appear in the memorial of the contestant, who denies the entire validity of the election law under which the sitting delegate obtained the certificate of the governor of the Territory. This denial is based on the alleged fact that the legislature which passed it was imposed upon the people by a foreign invading force, who marched into the Territory at the election, and seized upon

the powers of government which Congress had provided for the actual inhabitants; which powers, it is said, have been held and exercised ever since by these strangers to the soil, under no other title than that of a strong hand and superior numbers, and to the entire subjugation of the people of the Territory. Two other reasons are assigned for the invalidity of the same statute, but they are questions of law rather than of fact. The contestant also states that, at the election for delegate, held under said law, and at which the sitting delegate claims to have been elected, many hundred illegal votes of non-residents were polled, and the rules for conducting it, prescribed by the statute, disregarded.

We understand the sitting delegate to deny these asserted facts, and also to contend that, as the contestant was governor of the Territory when the first election for members of the legislature occurred, and gave certificates of election to the persons pretending to be elected, he is estopped from setting up now that they were not legally elected, whatever the state of facts may be; and that, therefore, the evidence indicating those facts cannot be heard, or the alleged wrongs investigated. Thus the case stands before us now, as to the right of the Hon. J. W. Whitfield to a seat. The Hon. A. H. Reeder, the contestant, bases his right to the seat on an election held at a different time—a right to which our attention has not as yet been directed, inasmuch as we understand no process for witnesses in relation to it is asked by either party.

The questions, then, to be considered are—

1. The importance and necessity of having a full investigation of the facts thus in dispute.

2. The effect of the alleged fact that the contestant, in his capacity of governor of the Territory, issued certificates of election to a portion of the first legislature.

3. Whether the evidence to establish the facts can be had satisfactorily and efficiently in any other mode than that suggested by the committee.

Upon the first point, we would urge the well known and admitted truth, that the case in hand has excited, throughout the length and breadth of the land, an intense and prevailing interest, far beyond that of an ordinary contested seat, and which cannot spring from a mere personal interest in the two gentlemen who are parties to it. The actual state of affairs in the Territory of Kansas for some time past, and which it now becomes necessary to know in deciding the present case, has, undoubtedly, arrested the attention and excited the feelings of the whole people of the Union, to an extent unparalleled, except in the case of hostilities with a foreign power. It furnishes the leading topics of conversation; the subject of newspaper controversies, of numberless public meetings, harangues, lectures, and associations; and the theme, also, of a special message to Congress, as well as a Presidential proclamation, in which the employment of the army forces is contemplated as a probable necessity. It is, however, still more alarming that sovereign States, in different sections of the Union, have deemed it their duty to consider the propriety of a direct interference, by men and arms, with the current of events there.

The allegation made—whether true or not, your committee cannot now decide—in substance is, that in this great republic, in this age of enlightened views, a part of the people of a sovereign State, with the apparent acquiescence of that State, have levied forces, which, duly organized, armed, and equipped, have been marched upon an infant territorial settlement under the care and protection of the United States government, and by force of military power, and superior numbers and resources, bearing down and silencing all opposition, have seized upon the government which Congress committed to the inhabitants, and reduced them to a state of subjugation and vassalage, without the power of making a single law, or electing a single officer for themselves. It cannot be considered a matter of surprise that such a charge, rung like a trumpet-

blast throughout the land, starting men to their feet in dismay and indignation, and arresting the attention, not only of the people, but of sovereign States, of Congress, and the President. The scene of this impending civil war is remote from the Atlantic States, and events are heard of only after they have fully transpired. We must expect that different statements and versions of these most important occurrences will be made and circulated, and that fact and falsehood will be mingled. And more especially so, as the vague and uncertain means of information afford, on the one hand, every opportunity for denying the truth altogether, or, on the other hand, of coloring and exaggerating it. We must also expect that, true to the infirmities of humanity, men and legislators will, to some extent, adopt those statements which conform to their wishes, and commend or exculpate their friends. And thus it is, that upon a great and momentous question, involving the right, the very existence of self-government, the supremacy of the laws, the lives and liberties of thousands of our fellow-citizens, and the peace, perhaps the perpetuity of the Union, not only the people of the States, but the legislators of the nation, are at variance—not upon principles or inferences so much as upon the simple facts necessary to understand the case. We may safely declare that there is no undisputed history. It would, indeed, present a singular spectacle if Congress should go on to discuss these questions; each senator and member in debate asserting his own facts and denying those of his opponents; failing to reach any satisfactory results, or arriving at results only by groping among allegations and denials, when they possess the most ample power to spread upon the record and before the country well-authenticated truths. It cannot be denied that the public expect from Congress an investigation which will separate truth from falsehood, and furnish a narrative in which full confidence may be placed. Nor can your committee doubt, that when this point shall be reached, united and tranquillizing action will commence. When the wrong, now defended by denial of its existence, is clearly proven, or shown to be imaginary, it cannot be that Congress or the public will find much difficulty in pronouncing upon the case a righteous judgment. But if we should avoid or smother investigation in a matter of such general interest and importance, and especially for reasons which might be considered by the public mind trivial or insufficient, we would but expose ourselves to the charge of wilfully shunning a plain duty, and seeking to leave the question in doubt and uncertainty. In the opinion of your committee, no reasons ought even to be considered, much less urged, against an entire and thorough investigation, unless those reasons are clear, substantial, and convincing.

Your committee have required the contestant to state, among other things, in writing, and with reasonable detail, the facts he proposes to establish before us by the witnesses and papers he asks to have procured; and he has submitted a paper, from which we make the following extracts:

That immediately before the 30th day of March last, being the day fixed for the election of a legislature for the Territory of Kansas, large bodies of men, without pretensions to residence in the Territory, came over from the neighboring counties of the State of Missouri, armed and organized into companies with their proper leaders, and supplied with provisions, fodder, accommodations for camping, ammunition, and, in one case at least, with artillery. That they marched into the Territory with banners and martial music, and encamped in parties in the vicinity of different election polls, shortly before the said election. for the purpose of preventing the people of the Territory from electing members of the legislative assembly, as provided by the act of Congress, of taking the power into their own hands, and, by intimidation or violence, taking possession of the polls, and themselves going through the form of electing members of the legislature, some of whom thus elected were non-residents of the Territory. That the country having been so recently settled, and the people as yet few and sparse, and comparatively unknown to each other, unorganized and unprovided with resources of any kind, were of course compelled to submit. That in the first election district there were from six hundred to one thousand of these invaders on the ground, who declared that they came to vote, and would vote at all hazards of life and property, and accordingly did vote, outnumbering the inhabitants, and by their violent conduct deterring

them from voting. That in the second election district, a party of several hundred of these persons, on being refused leave to vote without testifying to their residence, made an effort to demolish the house in which the election was held; and, finally, by threats and violence drove the judges from the ground, and substituted others from their own body, whilst the actual residents of the district generally retired to their homes and declined voting. That in the third election district, several hundred of them took possession of the polls with similar manifestations of violence and intimidation, substituted election officers from among themselves, and took the entire control of the election, the inhabitants retiring from the ground. In the fourth, fifth, sixth, and seventh election districts, similar bodies of men appeared at the polls, with more or less of military organization, and more or less of intimidation and violence, in each case voting for members of the legislature as though they resided in the Territory, and producing a result different from that which would have happened if the elections had been controlled by the qualified voters of the district. That in the sixteenth election district the election was controlled by a large number of non-residents, some of whom had come in organized and armed a day or two before the election, and established themselves in camps near the polls, and who returned to their homes, in the State of Missouri, immediately after the election: and some of whom had come from Platte county, Missouri, by steamboat, in the forenoon, voted, and returned home by the same boat in the evening; and thus over eleven hundred votes were polled, of which not over three hundred were cast by actual inhabitants of the Territory. In the thirteenth election district, very few, if any, of the actual inhabitants participated, in consequence of the presence of a large body of strangers, who took the control of the election, and polled nearly the entire vote. In the eighteenth, (a small district of some twenty or thirty voters,) a well-armed body of strangers appeared on the election ground to the number of about sixty, who voted, and immediately after took up their line of march out of the district, and towards Missouri, their leader being the Hon. David R. Atchison. In the eleventh, fourteenth, and fifteenth election districts, the undersigned will endeavor to prove, and believes he can proove, *similar* illegal voting.

On the day fixed for passing upon the returns of these elections, to wit, he fifth day of April, complaints were made to the governor from some of the districts, setting forth these facts, and there appeared to be defects in some of the returns. Seven of the said districts were set aside, and in the remaining cases, the returns being in form, and no complaint being made of illegal votes, as provided in the proclamation, certificates of election were granted according to them. The fact in regard to the uncontested districts have come to the knowledge of the undersigned since that time, and he has also learned that the reason why the same were not contested was, that the inhabitants were prevented by intimidation and fear of injury to life or property from doing so, considering it unsafe to assume the position of contestants. One gentleman, who was active in getting up a contest in the sixteenth district and who made affidavit to the complaint, was, after much denunciation, forcibly seized by a party of men, carried off into the State of Missouri, and there lynched with gross indignity and brutal violence.

An election having been ordered for the 22d of May, 1855, to fill the vacancies created by setting aside certain of the districts, persons were then elected; and in the sixteenth district, as your memorialist has since learned, the election was again carried for the same candidates, and by the same means as it had been on the 30th of March; but no complaint was then made. In the other districts, the actual inhabitants were unmolested, and elected other representatives, who, as well as those of the sixteenth district, received their certificates from the executive. All the members thus elected on the 22d of May, however, excepting those from the sixteenth district, (elected by a body of strangers,) were rejected, and their places filled by those whose election had been set aside, and who had not the certificate of the governor, as required by the organic act, although the legislature had not the power, usually conferred upon legislative bodies, to judge of the qualifications of their own members.

The undersigned also desires to prove that, notwithstanding Congress, by the organic act, fixed a certain place as the temporary seat of government of the Territory, and in the same act forbade the legislature to exercise any power inconsistent with the provisions of said act, yet the legislature, in disregard of said congressional prohibition, assumed to change the temporary seat of government to a place entirely different from that which had been designated by Congress, and at that place, so selected by themselves, enacted all their laws, with two exceptions.

The undersigned also desires to prove, by said witnesses and papers, that, at the election in October last, at which the sitting delegate (J. W. Whitfield) claims to have been elected, he received many hundreds of illegal votes, principally non-residents, and that the said election was not conducted according to law.

These are startling allegations; and when the contestant offers to prove their truth, your committee shrink from the deep and solemn responsibility of declining to allow him the opportunity to do so, or of casting the least obstacle in his way. When facts are proclaimed to exist, striking at the very root of our institutions, and tending to the total subversion of republicanism, it is no time to be dredging among technicalities or abstractions for the material out of which to

construct equivocal objections. We conceive that the rights of the contestant personally, the rights of the citizens of the Territory whom he claims to represent, and upon whose behalf he appears here, the right of this house to know whether the people under their tutelage and protection have been despoiled of that self-government which Congress conferred upon them, and the duty which the House owes to their constituents and the country, all concur to demand the proposed investigation; and that, too, in the most thorough and effectual mode that can be devised.

The objection to this investigation, on the ground that the contestant is estopped from denying the legality of the territorial legislature, seems to your committee to be entirely too narrow and untenable. The doctrine of estoppel is pronounced by all judges and lawyers to be an odious one, even in courts of justice, bound down by strict rules of law, which they cannot transgress, and is never treated with favor. In this house, which is bound by no rule but its own sense of right and conscientious discretion, it would be most singular, at least, to select one of the most obnoxious dogmas of the common law—one not binding upon us, and which we can adopt or reject at pleasure—one which the courts have desired to get rid of—and make it, unnecessarily and gratuitously, the means of shutting out the light from ourselves and our people, and of effectually smothering an investigation of facts which have convulsed the country.

But, again: if we concede the doctrine of estoppel, which we are thus asked to adopt, the next question to be met will be, whether this doctrine applies at all to public official acts; and whether a person acting in an official capacity can estop himself from the performance of any duty which he may afterwards owe to the public as a private citizen, or in another and different official capacity. Your committee consider it perfectly clear that he could not. The doctrine of estoppel is applicable only to matters of private right, and all attempts to apply it to public official acts and political questions can effect nothing more than the raising of an issue of personal consistency, with which this house has nothing to do. But we go further still, and say, that even if all the objections already stated are abandoned, and, for argument's sake, the estoppel be held good against Governor Reeder, the case is not, in the least degree, affected by it. The people of the Territory, of course, are not estopped; and although this is admitted, as we understand it, yet it is replied that none of them are contestants. The contesting delegate appears before this house as the representative of the people of Kansas; he speaks for them, and in their behalf; he states that they, through him, deny the validity of the legislature, or that it was ever elected by them. All this he sets forth in his memorial, and the House has recognized his right to do so by receiving that memorial without objection, and referring it to your committee. It is too late now to deny his right to speak for the people of Kansas. He came before the House as the mouthpiece and agent of that people, professing to have the right to speak for them, and in that capacity the House has granted him a hearing. There is no more familiar principle of law than that, when a petition is entertained, the capacity in which the petitioner claims to appear is admitted. If the House would deny the contestant's right to speak for citizens of Kansas, they should have rejected his memorial in the shape it was offered. Not having done so, to adopt the argument of the objectors they are themselves estopped.

But this is not all. This house needs no parties in court, or names on the record, to guard its own rights and privileges; nor any extrinsic action to quicken it in the exercise of the exclusive power to judge of the "election returns, and qualifications" of those who claim seats on this floor; and they may institute, and often have instituted, investigations of the right of members to seats, without any contestant at all. It is not only their right, but their duty, to see that no one shall occupy a seat on this floor whose title is imperfect, and

to investigate, of their own motion, whenever there is a reasonable doubt cast upon the case.

It has been faintly urged that the book of acts and the journal prove the existence of a legal legislature. This, your committee suppose, will scarcely be pressed. They cannot understand how the issuing of a journal and a book of acts is referrible to a *legally* elected, any more than an *illegally* elected legislature; nor how the existence and production of these books can throw any the least light upon the subject, when both parties admit there was a body of men professing to be a legislature, and differing only, in that most material question, as to its legal title to the office.

The remaining question to be examined is, whether the evidence can be had satisfactorily and efficiently in any other mode than that suggested by the committee; and your committee would here report the following extracts from the paper submitted by the contestant:

The undersigned states that the papers which he desires are among the executive minutes and executive files of said Territory, and that he made frequent efforts to procure certified copies from the same, by calling upon and sending to the secretary of the Territory; that the said secretary, having made one of the copies desired by the undersigned, promised to make out the others, but delayed doing so until the undersigned had left the Territory; after which he for some time evaded the requests of messengers and letters, and at last positively refused to furnish them. The undersigned, knowing that Congress had by the organic act required the secretary to forward to the President of the United States semi-annually full copies of said minutes, expected to supply from the said semi-annual returns what the secretary had refused. In this reasonable expectation, however, he has been disappointed, as he has ascertained that the said returns, due on the 1st of July, 1855, and the 1st of January, 1856, have been withheld, in direct violation of the act of Congress.

The undersigned also states that he did, in the month of October last, endeavor to supersede the necessity of bringing witnesses before the committee, by an arrangement which he supposed was well matured, to take depositions in the Territory, and caused notice of various times and places to be served on his opponent in this proceeding. One of these places was in the State of Missouri, where he had engaged a resident of the place, and also a lawyer, to attend to the taking of them, for compensation. Why they were not taken at that place the undersigned has never learned, and does not know. In the Territory they were taken at some places; but there being no person within fifty miles to administer an oath, and not even a justice of the peace under the disputed laws, they were sworn before private individuals. In other places they were not taken, because it was considered impracticable. The only judicial officer in the Territory whose power to administer oaths is undisputed is the chief justice; and it could not be expected that he would, to the neglect of his official duties, and without the right to receive any compensation, spend three or four weeks in a trip of several hundred miles, amidst the discomforts of the Territory, merely for the purpose of administering oaths. The two seats of associate justices are in dispute between four gentlemen, all claiming that they hold commissions from the President, which are still in force. The justices of the peace appointed under the act of Congress have gone out of office by expiration of their commissions. Those who are to succeed them, by the territorial laws, are to be appointed by the boards of county commissioners, and their appointments, as well as the laws under which they were created, the great mass of the people of the Territory refuse to acknowledge as binding, and would not voluntarily recognize the authority of such a justice by going before him to take an oath. As the want of legality and binding force of those laws is a part of the position assumed by myself and the people of the Territory in this case, it would be grossly inconsistent to invoke the authority of these officers to our aid in assailing that authority; and upon this point, it would seem from the answer of my opponent, both parties agree. In addition, it may be stated that the said county boards, either because they doubted their own authority, or because they considered justices of the peace unnecessary, or for some other reason satisfactory to themselves, have exercised their power in very rare cases. And although the undersigned is willing to admit that there may be justices who are unknown to him; and although the executive minutes, the only certain source of information, have been closed against him, yet he has some knowledge of the Territory, and is aware of only three justices of the peace in it. Other reasons still might be adduced for the failure of the attempt to take depositions, drawn from the fact that the settlements of the country were not more than sixteen or eighteen months old; and that there was an absence not only of officers, but also of facilities for bringing and keeping witnesses together, and transacting business at the different points where depositions should be taken. But upon these reasons it is unnecessary to dwell.

The undersigned did not ask for a commission to take testimony in the Territory, for a number of reasons. It would be liable to all the objections stated heretofore in regard to

depositions, except the absence of an officer to administer the oath. The difficulties to be encountered by the commissioner, in the want of business accommodations and travelling facilities, would cause great and serious delay. There would be difficulty in keeping together and accommodating a number of witnesses at the requisite number of places, especially in the winter; and, above all, the state of society is such, that the depositions could not, in all probability, be taken satisfactorily. The public annunciation of a time and place for taking them would attract attention and create excitement. Others than the witnesses would gather, and a strong interest would be felt and manifested in the result. The will of men has been already almost entirely substituted for the administration of justice, and, as I have shown, there seems to be no disposition on the part of those who have seized upon the legislative power to put in motion any system of law in the administration of justice. Trespasses, assaults, and murders are openly committed, and no one thinks of appeal for redress to the law, because from that source no redress can be had. Witnesses would probably be intimidated, and made to testify under serious apprehensions; and, in many cases, their evidence, if truthfully and boldly given, would undoubtedly produce exasperation, and perhaps conflict. The present intelligence from the Territory brings strong and portentous indications of a renewal and continuance of lawless violence, such as has but recently converted its plains into encampments, and suspended all the peaceful pursuits of life, by making the rifle and the strong hand the only arbiters of men's lives and destinies; and in the mean time, whilst the one party are satisfied that the slightest thing will be made the pretext for precipitating a hostile force into the Territory, the other are availing themselves of this apprehension to encroach upon and destroy the few rights which have survived to the people of the Territory from the unheard-of tyranny and oppression under which they have lived for the past year.

In a word, menace, intimidation, and improper influences are rife in the Territory, especially along the border; men's rights are held in no regard; official authority commands no respect, and seems to have no restraining tendency or power; and the peace of the country hangs by a thread.

These are the principal reasons why the undersigned did not ask for a commission to be sent into the midst of these extraordinary scenes.

The names of witnesses have been already submitted. By going over that list carefully and critically, it is believed that the number can be reduced.

The reasons assigned for the failure of the attempt to take depositions have appeared to your committee satisfactory and sufficient; and we may add that, had there even been the most undoubted neglect in that particular, your committee would have deemed it their duty to obtain evidence of the facts, not so much for the sake of the contestant, as for the grave issues made up before the House and the whole country. The severe allegation made by the contestant, of a most extraordinary and deliberate attempt on the part of a high officer of the government—the secretary of the Territory—to withhold all copies of papers in his office, and even those required to be forwarded semi-annually under the organic act, and thus to hide the truth and embarrass the action of Congress, would seem to be almost incredible, did not the contestant deliberately aver the fact, and his readiness to prove it. Your committee have no further remark to make upon this subject, until the fact shall be established, and they shall have heard what is to be said in explanation or justification of the conduct of the secretary. It is sufficent now to say, that the allegation referred to is a sufficient excuse for the non-production of the papers. Your committee cannot consent that their action shall be baffled and thwarted in this manner, and are of opinion that these papers must be had.

Your committee are further informed, by the statement of the contestant, that the testimony cannot be otherwise procured; that, in truth, there are such obstacles to encounter as to prevent the taking of it in any other way than that contemplated by them. This, we are convinced, is entitled to credit. The President of the United States has issued his proclamation, and sent his orders to the military officers of the United States, looking to the employment of their forces in hostile conflicts throughout the very country where the witnesses must be collected and the testimony taken. If we are to judge from the general tone of the public press, and opinions found in messages and debates of the governors and legislatures of several of the States of the Union, it would seem that parties there are actuated by a bitterness of feeling unparalleled in our history, and that there is imminent danger of a serious collision. We cannot perceive the propriety

of sending a commission to take testimony in the midst of a scene of strife, or impending strife, and particularly when the execution of the commission would necessarily bring adverse elements in contact, increase excitement, and present a constant point of conflict; where commissioners would be powerless in the midst of masses of armed men, and where every circumstance would be unfavorable to eliciting truth.

It would also appear, if the recited statement of the contestant be correct, that not only has this infant settlement been disfranchised and deprived of all civil rights and civil liberty—not only has it been deprived of the privilege of making its own laws and electing its own officers, but that they have been denied the ordinary privileges accorded to an enslaved people—of living under a system of government which shall, at least, secure them peace and tranquillity in their subjugated condition. Despotisms usually pride themselves upon preserving peace and good order within their limits, and endeavoring to commend to their subjects the state of vassalage under which they labor by a careful provision of all the tribunals necessary to preserve all the rights which remain. In this case, however, it is contended that the functions of government have been usurped, not to be exercised and carried out in the usurpation, but principally to be neutralized and extinguished; that the people are left without the protection of law, because they are without official agents, system of police, or administration of justice, to vindicate its remedies or enforce its penalties; and thus, under a pretence and form of law, the country is surrendered a prey to violence, anarchy, and bloodshed. Your committee do not undertake to assert that these things are true, but they allude to the fact of their being alleged as tending strongly to prove the necessity of a thorough investigation.

It has been objected that the cost of this investigation will be large. But the objection, we doubt not, derives most of its force from the exaggerated estimates of those who make it. The expense of the proceeding should certainly be looked to, but not to the exclusion of all other and higher considerations. Those charged with the administration of the government have not been in the habit of estimating cost so closely as it seems to be calculated in this cause. It has not been long since some thirty thousand dollars of the national treasure were expended for the purpose of reclaiming a single fugitive from service. This was done in a controversy about property, and the amount of that property insignificant. This reference is not made for the purpose of casting censure upon Executive action, but simply to show that, in sustaining the law, the expense to be incurred is measured by the dignity of the law itself, and not by individual rights which may be affected by the proceeding. In the case now before us, matters are involved which cannot be estimated by dollars and cents. We have to deal with a community professedly governed by Congress, over whom we claim the right to appoint the entire executive and judicial departments, and to whom we have guaranteed the right to elect the dominant portion of their legislature, and through them, to a limited extent, to make their own laws and their own officers. The general government insists on the right thus to govern and control them, and to chastise them with her army unless they submit quietly to such government. The duty of protection follows the governing power in all cases, political and domestic, as the shadow follows the substance. This is a principle of which no tyro is ignorant. When it is urged, then, that this weak and infant settlement is assailed by strangers, and deprived of the very rights which we have provided for them, and that, too, at the very moment when we are exacting from it the most implicit obedience to our authority, it becomes a solemn duty on our part to protect as well as to govern, and that without regard to cost. If we should turn coldly and selfishly away from an ascertainment and a vindication of the rights of the assailed, we would prove ourselves false—utterly false—to our duty, our dignity, and our honor.

Your committee do not hesitate to say, however, that they have determined, should the power asked for be granted, that they will exercise every reasonable precaution, not only to limit the number of witnesses, but also the time for producing and examining them. In short, their effort would be to promote economy of time and money, so far as it would be consistent with a discovery of the whole truth. The details of this process must, of course, be left to the committee, who alone could arrange them accurately and satisfactorily by means of informal consultations between themselves and the parties to the contest, and who must be supposed desirous of incurring no expense which should not be actually necessary.

For the reasons stated, your committee respectfully recommend the adoption of the following resolution:

Resolved, That the Committee of Elections, in the contested election case from the Territory of Kansas, be, and are hereby, empowered to send for persons and papers, and to examine witnesses upon oath or affirmation.

MINORITY REPORT.

The undersigned, members of the Committee of Elections, not agreeing with the majority in their report on the reasons and grounds upon which they ask for the power to send for persons and papers in the Kansas election, beg leave to submit briefly their views of the question.

Without entering into the uncertain region of vague rumor, and its undefined, indistinct, and contradictory statements, whether of individual or popular assemblages, they prefer to submit to the House the facts of the case as they now stand before the committee.

The memorial of Hon. A. H. Reeder to this body; his notice to Hon. John W. Whitfield, the sitting delegate, informing him of his intention to contest his seat upon this floor; the reply of the sitting delegate to that notice, under the act of Congress of the 19th February, 1851; the certificate of the sitting delegate's election, duly made out and signed by the governor of the Territory; a written statement filed by the memorialist, setting forth certain allegations, which he wishes to be permitted to establish by proof; and a written reply by the sitting delegate to that statement, embrace all the papers and evidence now before the committee. And that the House may understand fully the nature and character of these papers, all of them will be appended to this report.

These papers, with their references, make up the whole case as it now stands before the committee. And from the whole it appears abundantly evident to the minority that the memorialist looks to no object but to vacate the seat occupied by the sitting delegate, upon the assumption, which he wishes to be allowed to attempt to maintain by the testimony of witnesses to be brought from Kansas and elsewhere, that there is no legally-constituted government in Kansas Territory. This is the object of the present application to send for persons and papers.

It is true the memorialist alleges that several hundred illegal votes were cast for the sitting delegate at his election. That, however, does not make a case sufficient to displace him, unless it also be shown that the memorialist, or some other person, at the same election, received more legal votes than he did. This we consider a well-settled principle, by repeated decisions in this house. It is not enough to vacate the seat of a member to show that he received illegal votes; but it must be made to appear, further, that some one else received a greater number of legal votes than he whose seat is contested. If the polls, for instance, in this case showed, as it is said, twenty-nine hundred votes for the sitting delegate, and if it be true, as asserted, that several hundred, or even twenty-

eight hundred of them, were illegal, yet he would still have one hundred legal votes to go upon, and to hold his seat upon, unless it be shown that some other person received more than one hundred equally legal votes. But this is not pretended in this case. It is not even alleged. The memorialist sets up his claim by the denial of the legal authority under which the election of the sitting delegate was held, and by virtue of an election held at a different time, by promiscuous gatherings of the people, without even the forms of law, and indeed, in open opposition to the only recognised laws of the territory. Nor has he produced or tendered any certificate, or evidence of any kind whatever, from any quarter, of his election, even in this irregular, disorderly, and confessedly illegal manner; so that his sole object, and that of the present application, seems to be to devolve upon the committee and the House an inquiry into the validity of the territorial law under which the sitting delegate was elected and returned, and mainly upon the grounds that the members composing the territorial legislature that passed the law were not themselves properly elected and returned. It is to establish this position that he wishes to have the committee empowered to send for persons and papers to Kansas. If it is the judgment of the House that we should enter into such an investigation, and take jurisdiction of that question—making ourselves the judges of the qualifications and election returns, not only of our own members, but also of the territorial and State legislatures, which follows as a matter of course, then the conclusion to which the majority of the committee have come is right; but it will be assuming a jurisdiction which we do not believe properly belongs to us, and will be establishing for the first time in our history a principle and a precedent of most dangerous tendency. If the House, however, should be of opinion that the investigation now sought, for the objects stated, should be gone into at all, and that testimony should be taken on the allegations made, we submit to the House that the ends desired could be much better attained by sending out a commission to Kansas to take and collect such testimony as may be deemed pertinent, relevant, and competent for a full and impartial disclosure of the whole matter, than it can be by imposing this onerous duty upon the committee, to say nothing of the delay, inconvenience, trouble, and almost utter impossibility of bringing all the witnesses that may be necessary to establish many important facts and matters that may arise in such a novel, intricate, comprehensive, and unheard-of proceeding. As the minority concur, in the main, in the general views of this case presented by the sitting delegate in the paper before alluded to, which was submitted by him to the consideration of the committee, they deem it proper, not only in justice to him and the people of Kansas, but for the better understanding of the whole matter, to submit it to the consideration of the House also; and they accordingly incorporate it as a part of their report.

All of which is respectfully submitted.

ALEXANDER H. STEPHENS.
W. R. SMITH.
M. OLIVER.

Paper filed with the committee by J. W. Whitfield, and made part of minority report.

To the Committee of Elections:

The undersigned, having presented his certificate of election, duly made and signed by the governor of Kansas, and the oath of office having been administered to him as the delegate of Kansas, desires to present to the committee the following statement, in reply to that made by Governor Reeder some days ago, a copy of which has been kindly furnished the undersigned by a member of the committee. *In the first place*, he respectfully submits to the committee that Governor Reeder, by his own showing, has no right to be heard before the House of Representatives in the contest he is now prosecuting for the seat occupied by the undersigned. He was not a candidate at the election at which the undersigned was elected. This he does not allege or pretend. Indeed, he was not a candidate at any

election authorized by any law. The extent of his claim to represent Kansas rests solely upon pretended votes cast for him at illegal gatherings of the people, acting in open hostility to the regularly constituted authorities of the Territory under their organic law. Nor does he even present any certificate or evidence of his having been chosen delegate by these revolutionary assemblages, who are attempting to set up a government in opposition to that established by Congress, so far as the undersigned is informed. A contest for a seat upon the floor of Congress, either for the place of senator, member, or delegate, can only be initiated and conducted by some person who, by his own showing, makes a case in which, if successful in removing a sitting member, he would be entitled to take and hold the seat thus vacated. The act of Congress of February 19, 1851, prescribing the mode of obtaining evidence in cases of contested elections, was passed to protect the House of Representatives against improper contests, and its provisions show that none should be entertained except such as are instituted by those who are in a condition to demand *prima facie*, at least, that they be admitted to the contested seat. The idea of contesting an election can have no other meaning than that the party contesting must have some legal claim of right to what he seeks to obtain. Governor Reeder having none, in this case, under any existing law, cannot, therefore, in any proper sense of the term, be recognized as a contestant before the House of Representatives. His position is somewhat analogous to that of any one who might choose to petition the House to refuse the admission of a member who presents himself with a certificate without any claim that the petitioner is entitled to the seat. In all such cases, the undersigned submits, the House should unquestionably refuse to act upon the petition or memorial either to refuse admission or to remove a member, unless the petition presented some question affecting the constitutional qualifications of members—such as that the party against whom the movement was instituted had not the requisite qualifications of age, residence, or citizenship. Under such circumstances, the House doubtless would and ought to entertain the memorial, and, after investigation of the facts, act on it accordingly. But this would not be a contested election, in the proper sense of the term. To receive and investigate such a memorial would be merely the exercise of the power given to the House to judge of the qualifications of its members. This power is fully admitted by the undersigned. Nor does he deny the right of any person to raise such questions touching the constitutional qualifications of members, either by memorial or otherwise. The House itself, without any petition or memorial, might properly raise the question themselves touching the constitutional right of any member to hold his seat upon the floor. But Governor Reeder raises no such question touching the constitutional qualifications of the undersigned. His allegations are, that the law under which the undersigned was elected, and certified to by the governor as the duly chosen delegate for Kansas, was invalid and void; because, as he affirms, the legislature that passed it were not properly elected themselves, and did not legislate at a proper place. These allegations raise questions relating not to the qualifications of the undersigned under the Constitution, or the returns of his election to this House, but relating to the qualifications and returns of the election of the members of the legislature of the Territory of Kansas, as well as the legality of their proceedings.

These are questions which the undersigned, *in the second place*, respectfully submits to the committee cannot properly be considered and decided by the House. Under the Constitution of the United States, each house of Congress is made the sole judge of the qualification and election returns of its own members. So in the several State legislatures and territorial legislatures, each house is the sole and absolute ultimate judge on these matters in their respective organizations. The law of the Territory under which the undersigned was elected he submits to the committee. It will be found on page 330 of the volume of the laws of Kansas published by authority. It was passed by the legislature organized in pursuance of an act of Congress, with which the committee and the country must be familiar. It bears upon its face the same verity, and has the same sanction of the regularly-constituted authorities, as the public laws of any of the States, or any of the other Territories. The undersigned, therefore, insists that the House cannot properly inquire into the validity of this law, upon the ground that the legislature which passed it was not properly elected. That is a question which another tribunal has the sole power absolutely to determine. The judgments of all courts of competent jurisdiction are conclusive upon all matters embraced in them, and are binding upon all parties. Their validity or invalidity cannot be inquired into by other courts. Every legislative body, in determining upon the qualifications and election returns of its members, acts in a judicial capacity. On such questions they sit as a court; and as their jurisdiction is full and complete over the subject-matter, so their decision must be final and conclusive. Otherwise the validity of any law of Congress might be assailed and inquired into in any of our courts, upon the ground that some or all of the members constituting one or the other branch of the law-making power were not properly elected. The House of Representatives, then, sitting as a court upon this matter now before them, can inquire into such facts relating to the validity of the laws of the Territory of Kansas, and such only, as any other court or judicial tribunal could inquire into upon the same point. As in determining upon the validity or constitutionality of a State law, they could not inquire into the qualifications and election returns of the members composing the legislature that passed it, so they cannot do it in this instance. The undersigned, therefore, submits, that the testimony proposed to be taken by Governor Reeder is not competent to prove the statements made by him.

But, *in the third place*, the undersigned does not wish, in what he has submitted, to be understood as admitting, in the slightest degree, the correctness of the statements of Governor Reeder. On the contrary, he most unequivocally and positively denies those statements touching the elections on the 30th of March of last year for members of the legislature of Kansas; and he can but express his surprise and astonishment at the recklessness with which these broad, general, indefinite, unsupported, and utterly unfounded assertions have been made. The committee need not be reminded that the memorialist in this case was at that time the governor of Kansas, appointed by the President of the United States under the law organizing that government. The election of the 30th of March was held in pursuance of his own proclamation. It was conducted by persons appointed by himself. All the election districts were formed and laid out by himself. At each, three superintendents or judges were appointed by him to hold the election. The judges were each required, under oath prescribed by him, to swear that they would allow no one to vote whom they did not honestly believe to be a qualified voter under the law of Congress. The oath was even more stringent than that; it contained these words: "We will *reject* the votes of all and every non-resident whom we believe to have come into the Territory for the purpose of voting: that, in all cases where we are *ignorant* of the voter's right, we *will require* legal evidence thereof, by his own oath or otherwise; that we will make a true and faithful return of the votes which shall be polled to the governor of said Territory."

The returns of the election so ordered, and held under such stringent regulations, prescribed and imposed on the judges appointed by himself, were made to him as directed. For some reasons, the returns for nine members out of the twenty-six composing the house of representatives, and three of the council out of the thirteen composing that body, were set aside, and new elections were ordered to take place in May. But all the others—ten of the thirteen members of the council, and seventeen of the twenty-six members of the house of representatives—were, upon the returns of his own officers of the election in March, pronounced by himself to be duly elected, and received certificates from him as governor accordingly. A very large majority, therefore, of both branches of the legislature took their seats by virtue of his own commission, as duly returned and qualified members, chosen at the March election, without contest, cavil, or complaint from him or anybody else. Now, shall this man, who then, as governor of the Territory, certified to the proper election of these members, be permitted at this late day to deny the validity of his own solemn official act? To begin with his list of complaints: Shall he be permitted to say that the member elected from the first district was improperly returned, in consequence of 600 or 1,000 men from a neighboring State having voted illegally for him, in the face of his own official certificate to the contrary? The undersigned refers the committee to the published journal of the house of representatives, which he submits to them, where it will be seen, on pages 1 and 19, that the member from the first district was commissioned by the governor himself as duly elected on the 30th of March. The same may be said of various other districts, set forth by him in the paper now under review. Suffice it, on this point, barely to add, that out of twenty-six members returned to the house at the election in March, he set aside the returns of but nine: and out of the thirteen members of the council, he set aside the returns of but three. The places of these *nine* and *three* were filled by new elections in May. These facts Governor Reeder cannot deny or gainsay. And the further fact that the house and council, in judging of the qualifications and returns of their own members, respectively awarded the seats to those who had been rejected by him at the first election, cannot vary or change the merits of the question. How, then, in the face of these facts, can it now be asserted that Kansas, on the 30th of March, was overrun by non-residents—literally invaded by armed men who, by thousands, marched through the country with "martial music," and "artillery, at least in one instance," and taking possession of the polls, carried the election in almost every district against the will and in terror of the inhabitants and qualified voters? If this were the case, where was Governor Reeder that he did not call upon the President for assistance to drive back the invaders? When he was setting aside the election of nine of the members of the house and three of the council, for some failure in the officers to comply strictly with his regulations in making the returns, why did he not set the whole of them aside for these unheard-of outrages which he now proclaims to the country? The undersigned submits that the excuse which is now lamely presented for this gross dereliction of duty, if his statement be true, is nothing but a pretext upon which to ground an after-thought. That excuse is, that these facts were not known to him at the time he gave his certificate of election, on the 5th of April. But how was it in July? The legislature, as the committee will see from the journal, were not convened by him until then—three months and upwards after the election. Is it probable, or even possible, that Kansas could have been overrun by a military force, and literally subjugated in March, without the governor's having heard of it by the 2d of July? That was the day on which the legislature met. The houses organized as usual. Committees were appointed by each to wait upon and notify the governor as usual. And in a reply, as will be seen on page 12 of the journal, the governor sent them a message commencing in these words:

"*To the honorable the Council and House of Representatives of the Territory of Kansas:*

"Having been duly notified that your respective bodies have organized for the performance of your official functions, I herewith submit to you the usual executive communication relative to the subjects of legislation, which universal and long-continued usage in analogous cases would seem to demand, although no express requirement of it is to be found in the act of Congress which has brought us into official existence and prescribed our several duties. The position which we occupy, and the solemn trust that is confided to us for organizing the laws and institutions and moulding the destinies of a new republic," &c.

This is certainly quite sufficient to show that Governor Reeder, on the 3d of July, did not consider the bodies of men he was then addressing as a set of border ruffians holding the important and "solemn trust confided" to them as legislators for "the destinies of a new republic," by no better right than that of seizing the polls by violence, and carrying an election by force, intimidation, fraud, and corruption. And who can believe, if what he now says was true touching the March election, that he would not by that time have known it; and, knowing it, who believes he would have recognized them as a properly constituted legislative body? In this very message, as will be seen, he invited the special attention of the legislature, constituted as it was, and he knowing all about its organization, to several matters of legislation. Among other things, he said to them: "The provisions for county courts and the officers connected with them, and the other officers of the Territory, which you may consider necessary; *the laws for regulating and holding elections; the qualifications of voters,*" &c.—these were matters submitted to them for their appropriate action upon. But now, strange to say, the very law regulating elections, &c., under which the undersigned was elected to his present seat, passed by that very body, according to the special recommendation of Governor Reeder himself, is at this time alleged by him to be invalid and void, because he says these same men whom he commissioned to sit as legislators, who were recognized as such by him, and who were urged by him to pass some law of the kind, were not properly elected, and had no proper authority to pass such a law. Is not Governor Reeder estopped from these, his own official acts, from disputing the authority of the Kansas legislature to pass the law under which the undersigned was elected? But again: On the 6th July Governor Reeder returned to the house in which it originated a bill moving the place of the sitting of the legislature for that session from Pawnee City to Shawnee Mission, with his veto. This will be seen on page 29 of the journal. This veto or disapproval of their action on that bill was not founded in the slightest degree upon any fact or matter upon the organization of the houses, or either of them; he withheld his approval solely upon the ground of the want of power in the legislature, under the organic law, in his opinion, to change the place of holding the session. But both houses, however, passed the bill with more than a two-thirds vote, and it was accordingly carried over the veto.

One other act of Governor Reeder the undersigned wishes to call the attention of the committee to. After the legislature had adjourned from Pawnee City to Shawnee Mission, as late as July 21, he again addressed them in a communication, vetoing two other bills. This second veto message is important to be noted, in this: Up to that time, the 21st of July, nearly four months after the March election, the governor makes no mention or complaint of the election of the members of the legislature, nor does he say anything against the propriety of the action of either the council or the house in the matter of the district elections set aside by him. This was all done before that message; but he places his veto of the 21st of July solely upon the ground that the legislature had, in his opinion, no power to adjourn from Pawnee City to Shawnee Mission. Up to that time, let it be noted, then, not a word was heard from Governor Reeder about the military invasion on the 30th of March before. Now, as Governor Reeder had the absolute control of the election of the legislature, so far as the arrangement of the districts was concerned, and fixing the times and places for voting, the appointment of all the judges of election, and establishing the rules and regulations for the returns to be made to him; and as he judged himself of the returns in each case, and commissioned as duly elected every member of both houses who took a seat in the organization, and recognized both branches as properly elected and organized by repeated messages; and as his sole reason for vetoing their official and legislative acts was his disagreement with them as to their power to change the place of their sessions, the undersigned most respectfully again asks: Is he not estopped? and ought he not to be held to be estopped from resorting to this afterthought of setting up the pretext which he is now attempting, that the members of that legislature were not properly elected? The whole merits of the case presented by Governor Reeder against the validity of the law under which the undersigned was elected, according to his position on the 21st of July last, rests solely upon the fact of the adjournment of the legislature from one place to another, as before stated, and as will be clearly perceived in his message of that date referred to. That point the undersigned will not argue before the committee. He refers them to the opinion of the supreme court of the Territory, to be found in the journal, page 1 of the appendix. The opinion there given the undersigned deems conclusive upon the point. Governor Reeder himself must have become satisfied of the weakness of the position then assumed, and hence his attempt now made to reopen the closed question of the election returns of the members of the legislature.

The undersigned, in this communication, does not wish to indulge in any comments upon the motives of Governor Reeder, and his official misconduct which led to his removal. If he did, a reason might be assigned for the veto of the act moving the legislature from Pawnee City to Shawnee Mission stronger than that to be found in the logic of the argument. But the undersigned cannot permit what is said in the paper he is replying to, about the general character of the people of Kansas, to pass unnoticed. It is said by this man, who would be forced upon them by a vote of the House as their representative on the floor, though upon trial he was found to be unfit to be their governor, "that menace, intimidation, and improper influences are rife in the Territory, especially on the border. Men's rights are held in no regard, official authority commands no respect, and seems to have no restraining tendency or power, and the peace of the country hangs on a thread." "Trespasses, assaults, and murders are openly committed, and no one thinks of appeal for redress to the law, because from that source no redress can be had."

To whatever extent this statement may be true, Governor Reeder ought best to know why it is so. Who but himself and those deluded victims who have linked their fortunes with his since his removal from office, setting themselves up against all law and order in the Territory, have produced this state of things? Who but those under his influence—not *bona fide* settlers in Kansas, but emissaries of mischief sent by his co-laborers elsewhere for purposes of civil strife—are now engaged in insurrectionary movements, with a view to overthrow the constituted authorities of the Territory, and to break down the only government and system of laws to which the people can look for the protection of life, liberty, and property? The actual residents of Kansas have a just appreciation of good government and a reverence for law. If they have lately been unduly excited by matters originating more with others than themselves, they are not to be censured therefor, and particularly by those wicked projectors of the evils by which they are molested. No society or community can be altogether quiet when treason against its very existence is plotted in its bosom.

Late information from Kansas, however, represents the state of the public mind there as much less excited than it has been, and warrants the indulgence in the hope that the threatened conflict between the revolutionists and those who stand by the laws of the land will not take place. Of one thing the undersigned feels confident—that nothing could do more to jeopard the peace of that Territory, and with it, perhaps, the peace of the whole Union, than for the open and avowed opposers of the laws there—those who have declared an intention to set up a system of their own in opposition to the government instituted under their organic law, of whom Governor Reeder may be considered the chief—to receive aid and countenance in their fell purpose by men in position and authority elsewhere.

JOHN W. WHITFIELD.

MARCH 4, 1856.

Memorial of A. H. Reeder, contesting the seat of J. W. Whitfield, delegate from Kansas Territory.

To the honorable the House of Representatives of the United States:

The memorial of the undersigned, on behalf of the qualified voters of the Territory of Kansas, and in his capacity of representative of said voters, as hereinafter stated, respectfully represents:

That he claims to be entitled to represent the said Territory in the thirty-fourth Congress, as congressional delegate, to the exclusion and in lieu of Hon. J. W. Whitfield, the sitting delegate, upon the following state of facts:

The said J. W. Whitfield, as your memorialist is informed, claims to have been elected at a pretended election held on the first day of October last in said Territory, which said pretended election your memorialist contends and proposes to show was absolutely void, being without any valid law or the will of the people or qualified voters to authorize or to support it.

That the law under which said pretended election was held emanated from a legislative assembly which the people and qualified voters of said Territory protest and declare through your memorialist were not elected by them, but imposed upon them by the force of superior numbers of non-residents, who could pass no law that would be binding on them, and whose election and action should not be sanctioned or recognized by this house, because they are utterly inconsistent with the idea of republican government, and destructive of the plainest and most undeniable civil and political rights.

That the said supposed election law was entirely nugatory and of no effect, because passed at an illegal and unauthorized place, where no valid legislation could be had; and was void in itself, and on its face, as containing provisions directly and materially violative of the act of Congress to organize the said Territory.

That said pretended election was not conducted even according to the forms and mode prescribed by the supposed law which purported to authorize it.

That many hundreds of illegal votes were polled at said pretended election by non-residents and others.

And your memorialist excuses himself for the want of specifications under the two objections last above stated, by reason that he has been unable to obtain from the executive office in said Territory the necessary information, or any copies of the returns of said election; that after several applications to the secretary of the Territory for certified copies of papers in his office had been neglected and evaded, the said secretary finally gave a positive refusal to furnish the copies demanded; and for the further reason, that the said secretary of the Territory has withheld the copies of executive minutes for the year 1855, although the law required him to furnish them semi-annually to the President of the United States; which said copies, had they been forwarded, might have furnished the necessary information to your memorialist.

And your memorialist further states, that he was duly elected by a large majority of the legal voters of the said Territory to the said office of delegate, at an election held on the ninth day of October, which he proposes to show was the only valid election held in the Territory for that purpose.

A. H. REEDER.

WASHINGTON CITY, *February* 12, 1856.

Upon the preliminary question, when it came up in the House, Mr. PHELPS said:

It seems to me the committee are seeking to obtain a power from this house which I think ought not to be exercised upon this occasion. The contestant, Mr. Reeder, who has presented his memorial, claiming a seat upon the floor of this house as the delegate from the Territory of Kansas, alleges in his memorial that he does not claim to be elected by virtue of the laws enacted by the legislature of the Territory he seeks to represent. This position, in disregard of the laws he deliberately informs us he has assumed. By virtue of the act organizing the Territories of Kansas and Nebraska, the first election of a delegate was to be held under the order which might be issued by the governor, prescribing the time, place, and manner of holding such election. So much of that act has been executed. At the last session of Congress a gentleman appeared here as a delegate from that Territory, and was admitted as such upon this floor, without objection from any quarter. If it be that the Committee of Elections desire to inquire into the legality of the laws enacted by the territorial legislature, I say they are about to do that which was never before done—inquire into the legality of the laws enacted by the territorial legislature of Kansas. By what right, by what authority can they do it? Those territorial laws were enacted, and they purport to have been enacted by a legislature duly elected in pursuance of a law of Congress, and the validity of those enactments, made in conformity with such law of Congress, cannot be rightfully contested in this house. They cannot be examined here for the purpose of determining whether they were duly enacted or not. Their validity can only be determined by the courts. The requirements of the act of Congress having been complied with, the validity of those territorial laws cannot be impeached by Congress. Then why summon witnesses? Why bring men two thousand miles in the dead of winter, when their testimony can avail nothing? * * * * * * * * * * *

Mr. STEPHENS argued as follows:

But, Mr. Speaker, when it is notorious that this law was passed by the legislature in Kansas, elected under the superintendency of officers appointed by the governor, of which we are bound to take public notice in all matters arising under it, and when it is proposed to *invalidate* this law, or any other such law, by oral testimony, should not this house require that the precise character of the testimony proposed to be adduced should be specially set forth, before we consent to give the power to a committee?

The memorial of Governor Reeder barely states that this act was illegal and void, and the election under it void. This is his case, as I understand it. But why illegal? why void? Was not the legislature duly elected and legally organized? This, though not stated, we all know is the ground upon which his contest rests. But can he raise that question? I have before me the journal of the Kansas legislature. The memorialist in the case was the governor of the Territory when the legislature that passed that act was elected and organized, as stated by the gentleman from Missouri, [Mr. Phelps;] and, whether rightly or not, he, the present memorialist, as governor, judged of the election returns, and recognized the legislature as duly and properly elected and organized. He assumed the power to judge of the election returns, and gave certificates of election to a large majority of the council and house of representatives. Many of the people of the Territory disputed his right to do it; but, as I have said, whether rightly or not, he assumed the power, and exercised it, to judge of the election returns, and certified to the proper election of a large majority both in the house and legislative council. The election of every member, I believe, who took his seat at the organization, was certified to under the governor's own hand or by his direction.

* * * * * * * * * * *

The organic law of the Territory, sir, gave the legislature all legislative power, under the Constitution, not inconsistent with that organic law. Well, one of the first functions of legislative power is, to determine where the body will meet. The organic law—the Kansas bill—said that Fort Leavenworth should be the temporary seat of government. The governor himself had changed that before the first session of the legislature. Congress afterwards gave them the absolute power to fix the permanent seat of government. The power to fix the permanent place, of course, includes the less power of sitting, until that place should be selected, just where they please.

I do not intend to detain this house longer upon the argument of this preliminary question: but Governor Reeder, in his message to the legislature, vetoing their bill changing the place of sitting, stakes his case of the illegality of the subsequent acts of that body solely upon the fact that they adjourned to a place which did not meet with his approval. He, in the mean time, was removed. His successor in office, however, sanctioned the proceedings of the legislature at Shawnee Mission; and there were passed all the laws, I believe, they now have for the protection of life, liberty, and property in Kansas.

Mr. DUNN. (interrupting.) I would like to ask the gentleman a question before he takes his seat. I believe that the right of a member or delegate to a seat upon this floor is a right which belongs not to the representative or delegate, but a right which belongs to his constituents. Suppose, therefore, that any gentleman upon this floor should absolutely make an affidavit, or do any other act which in a court of justice might be regarded as an estoppel, short of an actual resignation, would that preclude his constituents from insisting upon his services in this hall?

Mr. STEPHENS. Very well. Suppose I grant it—admit what you say—we have been here two months and upwards, and we have heard no mortal man, except Governor Reeder, questioning the right of General Whitfield. When and where have the constituents of General Whitfield spoken? Have you heard a mortal man of Kansas, except Reeder, complain of the legality and rightfulness of General Whitfield's election? If you have, when and where?

Mr. DUNN. The question which I present to the gentleman from Georgia is the question of the power of any man to estop himself of his duty to represent his constituents upon this floor.

Mr. STEPHENS. The question was, whether anything Governor Reeder has done should jeopard the right of the constituents of General Whitfield or the people of the Territory of Kansas? I say no; but we are acting upon the memorial of A. H. Reeder, and I say A. H. Reeder is estopped. When General Whitfield's constituents speak, or the people of Kansas speak, and say that he is not their duly elected representative or delegate, I will give not only a respectful hearing to their memorial, but go into an investigation of it. If Governor Reeder has any constituents who will say that they ought not to be estopped by his act, I will give them a like hearing and investigation. I will take the cases as they come. We are acting now upon the memorial of ex-Governor Reeder, and it is enough for me to show that *he is estopped*.

Now, as I stated before, I do not intend to detain the House. I think that, if the House were in possession of all the facts which have caused this motion, they could vote more understandingly. I therefore move that this resolution be recommitted to the Committee of Elections, with instructions to report the grounds upon which they make this application for extraordinary power, and the reasons which induce them to do it.

Mr. CAMPBELL spoke as follows: * * * I believe that where a statute is founded in fraud, there is no power on earth that can give vitality or validity to it. And for the purpose, Mr. Speaker, of showing this house that Congress has committed itself to the principle which I assert—the right to repeal a territorial law tainted with fraud—I need go no further back than to the last session. I will show that this power has been exercised by nearly every member on the opposition side of the chamber. It will be recollected that during last Congress a land grant to the Territory of Minnesota, of eight hundred thousand acres, was passed. A committee of investigation was raised. The result of the examination was, that the grant was declared to have been fraudulently procured. Subsequently, there were other frauds exposed to the judiciary branch of the government in relation to this land grant. It then became necessary, in order to defeat the fraud, that a certain charter, which had been granted by the territorial legislature of Minnesota, should be repealed. It was not alleged, I believe, or proven in the course of the examination, that the passage of the act conferring this charter had been fraudulently procured; but still, with a view to prevent the execution of a fraud incidentally connected with the act of the territorial legislature, a resolution was unanimously reported to this house by the Committee on the Judiciary, at the last session, disapproving and disaffirming the act of the legislative assembly of the Territory of Minnesota, entitled "An act to incorporate the Minnesota and Northwestern Railroad Company."

On the final vote that was taken on that resolution, one hundred and sixteen members of this house voted to repeal the act of the territorial legislature, and sixteen against it. Nearly all the friends of the Nebraska bill voted for the resolution, thereby asserting the power of Congress to disaffirm and repeal an act of the territorial legislature. The honorable gentleman from Georgia [Mr. Stephens] did not vote. How he would have voted, had he been in the hall at the time, I do not know. But I refer to this vote for the purpose of showing the

members on the opposite side of the House that they are committed to the principle which I have affirmed here—namely, the right of this body to repeal any legislative act of the Territory of Kansas, or of any other Territory, if there be proof that the act is founded in fraud.

Mr. BINGHAM argued that the House is to judge of the elections, as well as of the qualifications of its members. If the House had no power to judge of the elections of its members, there might be some ground for the assertion that they could not go behind the fact of the election to inquire into it. But, inasmuch as the validity of the election of the sitting delegate depends upon the rightful exercise of the legislative power in the Territory, by the legislative assembly, we have as much power to ascertain what that assembly was, by whom chosen, and how it exercised its power, as we have to inquire into the mode and manner in which the election of the first Monday of October last was conducted. The minority of that committee seem to hold the opinion, that the contestant has no color of claim here, because he was chosen at an election not authorized by a territorial statute. Is not this begging the whole question, and an *implied* concession of the very point in dispute? If, then, a statute, a legal territorial statute, was essential to this Kansas delegate election, why is it not as competent for this house to inquire whether there was a *body* authorized to *enact* the statute, as to inquire if the statute had been enacted? Both inquiries are necessary to enable the House "to judge of the election." But we are told the House must take notice of the statutes. Certainly not, when it is denied that they are valid statutes, and it is charged, and in issue, that there was no legally constituted legislative body to enact the statutes. But we are again told that every legislative body is the exclusive judge of the qualifications of its own members, and that its judgment is final.

Mr. DAVIS, of Maryland. It has been argued, with great strength and irresistible authority, that no court could take into consideration the questions which we are now called on to decide by the majority of the Committee of Elections. That is to say, you are called on to investigate the right of Mr. Whitfield to a seat upon this floor, not because of frauds *in the election at which he was elected*—not because of the violence which was *there* perpetrated—not because of the illegal votes which were *then* cast—not because of the honest voters who were driven away from *those* polls; but because the *law* under which that election was held was invalid—invalid because the members of the legislature were not properly elected; and that the legislature was not properly elected because of the *violence and frauds committed in that election*. The honorable gentleman before me [Mr. Walker] argued with irresistible logic, and it was argued with equal force by the honorable gentleman from Georgia, [Mr. Stephens,] that *no court* could inquire into the legality of the organization of any legislative body; and from that they sought to deduce the argument that *this House* could not inquire into it.

Now, sir, while the principle is undoubtedly true, I may be permitted to doubt whether the consequence must necessarily follow. It has been said that this has been repeatedly decided not to be a judicial question; and so it undoubtedly is not a judicial question.

Courts of justice assume the existence of the legislative body; they assume the existence of the law. They take the authority of the body that passed the law from some other power in the State. The constitution of the legislature is therefore a thing that never has been, and never can properly be, made a matter of *judicial* investigation. The laws are taken by the courts as the expressed will of some body holding authority in fact, which they are not at liberty to question; and the recognition of the existence of the legislature is made by some other functionary vested with jurisdiction over that subject. The legality of a legislative body can never be made a matter of original proof in the court of justice. The court accepts on that point the recognition of the political authority, and does not look beyond the decision into the sufficiency or insufficiency of the grounds for it. All judicial functions proceed upon the assumption that there is a legislature in existence. Its functions only begin when that previous question has been decided. It is for that reason that no court of justice ever has raised—no court of justice ever can raise, the question that is sought to be raised here.

But does it follow that *this House* can decide *that* question? There are a great many questions that a judicial tribunal cannot decide, and one of them is that touching the validity of the elections in virtue of which gentlemen around me hold their seats in this house. It cannot be passed upon by any judicial tribunal so as to bind anybody at all upon that question. The reason is, that the election for this house is not and cannot be made a judicial question. That is a point behind and beyond the point at which the powers of the judiciary start. It lies in the circle of the political functions of the State. It is one of those questions which must be decided before any question can be decided by the judiciary, before any matter can take its start which is to be decided under the municipal law before the courts. But this house can decide, and does decide, as a first resort and as a last resort, upon the validity of the election of its own members. It does not follow, therefore, because the courts cannot decide a question, that this house cannot decide it.

The House first adopted the resolution reported from the committee; then reconsidered that vote, and sent it, with an amendment, back to the committee.

The committee reported again the original resolution, and the House adopted an amendment to it offered by Mr. Dunn, of Indiana, which was as follows:

Resolved, That a committee of three of the members of this house, to be appointed by the Speaker, shall proceed to inquire into and collect evidence in regard to the troubles in Kansas generally, and particularly in regard to any fraud or force attempted or practiced in reference to any of the elections which have taken place in said Territory, either under the law organizing said Territory, or under any pretended law which may be alleged to have taken effect therein since. That they shall fully investigate and take proof of all violent and tumultuous proceedings in said Territory, at any time since the passage of the Kansas-Nebraska act, whether engaged in by residents of said Territory, or by any person or persons from elsewhere going into said Territory, and doing, or encouraging others to do, any act of violence or public disturbance against the laws of the United States, or the rights, peace, and safety of the residents of said Territory; and for that purpose said committee shall have full power to send for and examine, and take copies of all such papers, public records and proceedings, as in their judgment will be useful in the premises; and, also, to send for persons, and examine them on oath, or affirmation, as to matters within their knowledge, touching the matters of said investigation; and said committee, by their chairman, shall have power to administer all necessary oaths or affirmations connected with their aforesaid duties.

Resolved further, That said committee may hold their investigations at such places and times as to them may seem advisable, and that they have leave of absence from the duties of this house until they shall have completed such investigation. That they be authorized to employ one or more clerks, and one or more assistant sergeants-at-arms, to aid them in their investigations; and may administer to them an oath or affirmation faithfully to perform the duties assigned to them, respectively, and to keep secret all matters which may come to their knowledge touching such investigation as said committee shall direct, until the report of the same shall be submitted to this house; and said committee may discharge any such clerk, or assistant sergeant-at-arms, for neglect of duty or disregard of instructions in the premises, and employ others under like regulations.

Resolved further, That if any person shall in any manner obstruct or hinder said committee, or attempt so to do, in their said investigation, or shall refuse to attend on said committee, and to give evidence when summoned for that purpose, or shall refuse to produce any paper, book, public record, or proceeding in their possession or control, to said committee when so required, or shall make any disturbance where said committee is holding their sittings, said committee may, if they see fit, cause any and every such person to be arrested by said assistant sergeant-at-arms, and brought before this house to be dealt with as for a contempt.

Resolved further, That for the purpose of defraying the expenses of said commission, there be, and hereby is, appropriated the sum of $10,000, to be paid out of the contingent fund of this house.

Resolved further, That the President of the United States be, and is hereby, requested to furnish to said committee, should they be met with any serious opposition by bodies of lawless men, in the discharge of their duties aforesaid, such aid from any military force as may at the time be convenient to them, as may be necessary to remove such opposition, and enable said committee without molestation to proceed with their labors.

Resolved further, That when said committee shall have completed said investigation, they report all the evidence so collected to this house.

The vote on the adoption of the report was, ayes 101, noes 93.

Messrs. Sherman, Howard, and Oliver were appointed a special committee, under the above resolutions. They proceeded to Kansas and conducted the investigation under the order of the House, submitting a report, which was referred to the Committee of Elections. The committee then made a second and final report upon the case, which follows:

Your committee believe that all the conclusions as to matters of fact arrived at by the said special committee are clearly and incontrovertibly established by the testimony in the case. Among those conclusions, applicable to the question of the seat in controversy between J. W. Whitfield and A. H. Reeder, are the following:

That each election in the Territory, held under the organic or alleged territorial law, has been carried by organized invasion from the State of Missouri, by which the people of the Territory have been prevented from exercising the rights secured to them by the organic law.

That the alleged territorial legislature was an illegally constituted body, and had no power to p[illegible] laws, and their enactments are, therefore, null and void.

That the election under which the sitting delegate, John W. Whitfield, holds his seat was not held in pursuance of any valid law, and that it should be regarded only as the expression of the choice of those resident citizens who voted for him.

That the election under which the contesting delegate, Andrew H. Reeder, claims his seat was not held in pursuance of law, and that it should be regarded only as the expression of the resident citizens who voted for him.

That Andrew H. Reeder received a greater number of votes of resident citizens than John W. Whitfield, for delegate.

That in the present condition of the Territory a fair election cannot be held without a new census, a stringent and well-guarded election law, the selection of impartial judges, and the presence of United States troops at every place of election.

In view of these conclusions, that the election of J. W. Whitfield was without any authority of law, and that he comes here as the choice of only a minority of the resident citizens of Kansas, your committee decide that he is not entitled to the seat which he holds as delegate from the Territory of Kansas.

The election under which A. H. Reeder claims was equally without authority of law; but, inasmuch as he comes here as the choice of a much larger number of the resident citizens of Kansas than the number of those who voted for J. W. Whitfield, your committee recommend that he be admitted to a seat as delegate from the Territory of Kansas.

The office of a delegate from a Territory is not created by the Constitution. Such delegates are not members of the House, and have no votes in its deliberations. They are received as a matter of favor—as organs through whom may be communicated the opinions and wishes of the people of the Territories. It is competent for the House—and this power has been often exercised—to admit private parties to be heard before it by counsel. It must be equally competent for the House, at its discretion, to admit any person to speak in behalf of the people of the Territories. It may, if it sees fit, admit more than one such person from each Territory. Under ordinary circumstances, no case calling for the exercise of this discretionary power will arise. In all the laws creating Territories provision is made for the election of delegates to Congress; and the people of the Territories, having the opportunity to be heard through such delegates, and by memorial and petition under the general provisions of the Constitution, could not ask to be heard through any other agency. In the present case, however, the people of the Territory of Kansas have been deprived of the power to make a strictly legal election of a delegate by an invasion from Missouri, which subverted their territorial government, and annihilated its legislative power. To deny to Kansas the right to be heard through the choice of its resident citizens, merely because that choice was manifested outside of legal forms, and necessarily so, because the law-making power was destroyed by foreign violence, is to deny to Kansas the right to be heard at all on the floor of the House.

Your committee cannot recommend to the House to declare that the seat of the delegate from Kansas is vacant, and to order that a new election be held. The objections to such a recommendation are obvious and insuperable. No law exists in Kansas for the election of a delegate to Congress, the provision on that subject in the organic law having reference only to the first election; and no territorial law for such an election can be enacted, for the plain reason that the law-making power of that Territory has been subverted by usurpation. To send this case back to the people of Kansas for a new election is merely to invite a repetition of the scenes of last October; and it is quite certain that, at the next session of Congress, some person would again appear, claiming a new election under territorial laws which your committee regard as nullities; while some other person would again appear, claiming a new election, as the choice, outside of the laws, of a majority of the people.

It is undoubtedly competent for the Congress of the United States to enact a law under which a legal election of a delegate from Kansas could be effected.

eight hundred of them, were illegal, yet he would still have one hundred legal votes to go upon, and to hold his seat upon, unless it be shown that some other person received more than one hundred equally legal votes. But this is not pretended in this case. It is not even alleged. The memorialist sets up his claim by the denial of the legal authority under which the election of the sitting delegate was held, and by virtue of an election held at a different time, by promiscuous gatherings of the people, without even the forms of law, and indeed, in open opposition to the only recognised laws of the territory. Nor has he produced or tendered any certificate, or evidence of any kind whatever, from any quarter, of his election, even in this irregular, disorderly, and confessedly illegal manner; so that his sole object, and that of the present application, seems to be to devolve upon the committee and the House an inquiry into the validity of the territorial law under which the sitting delegate was elected and returned, and mainly upon the grounds that the members composing the territorial legislature that passed the law were not themselves properly elected and returned. It is to establish this position that he wishes to have the committee empowered to send for persons and papers to Kansas. If it is the judgment of the House that we should enter into such an investigation, and take jurisdiction of that question—making ourselves the judges of the qualifications and election returns, not only of our own members, but also of the territorial and State legislatures, which follows as a matter of course, then the conclusion to which the majority of the committee have come is right; but it will be assuming a jurisdiction which we do not believe properly belongs to us, and will be establishing for the first time in our history a principle and a precedent of most dangerous tendency. If the House, however, should be of opinion that the investigation now sought, for the objects stated, should be gone into at all, and that testimony should be taken on the allegations made, we submit to the House that the ends desired could be much better attained by sending out a commission to Kansas to take and collect such testimony as may be deemed pertinent, relevant, and competent for a full and impartial disclosure of the whole matter, than it can be by imposing this onerous duty upon the committee, to say nothing of the delay, inconvenience, trouble, and almost utter impossibility of bringing all the witnesses that may be necessary to establish many important facts and matters that may arise in such a novel, intricate, comprehensive, and unheard-of proceeding. As the minority concur, in the main, in the general views of this case presented by the sitting delegate in the paper before alluded to, which was submitted by him to the consideration of the committee, they deem it proper, not only in justice to him and the people of Kansas, but for the better understanding of the whole matter, to submit it to the consideration of the House also; and they accordingly incorporate it as a part of their report.

All of which is respectfully submitted.

ALEXANDER H. STEPHENS.
W. R. SMITH.
M. OLIVER.

Paper filed with the committee by J. W. Whitfield, and made part of minority report.

To the Committee of Elections:

The undersigned, having presented his certificate of election, duly made and signed by the governor of Kansas, and the oath of office having been administered to him as the delegate of Kansas, desires to present to the committee the following statement, in reply to that made by Governor Reeder some days ago, a copy of which has been kindly furnished the undersigned by a member of the committee. *In the first place*, he respectfully submits to the committee that Governor Reeder, by his own showing, has no right to be heard before the House of Representatives in the contest he is now prosecuting for the seat occupied by the undersigned. He was not a candidate at the election at which the undersigned was elected. This he does not allege or pretend. Indeed, he was not a candidate at any

election authorized by any law. The extent of his claim to represent Kansas rests solely upon pretended votes cast for him at illegal gatherings of the people, acting in open hostility to the regularly constituted authorities of the Territory under their organic law. Nor does he even present any certificate or evidence of his having been chosen delegate by these revolutionary assemblages, who are attempting to set up a government in opposition to that established by Congress, so far as the undersigned is informed. A contest for a seat upon the floor of Congress, either for the place of senator, member, or delegate, can only be initiated and conducted by some person who, by his own showing, makes a case in which, if successful in removing a sitting member, he would be entitled to take and hold the seat thus vacated. The act of Congress of February 19, 1851, prescribing the mode of obtaining evidence in cases of contested elections, was passed to protect the House of Representatives against improper contests, and its provisions show that none should be entertained except such as are instituted by those who are in a condition to demand *prima facie*, at least, that they be admitted to the contested seat. The idea of contesting an election can have no other meaning than that the party contesting must have some legal claim of right to what he seeks to obtain. Governor Reeder having none, in this case, under any existing law, cannot, therefore, in any proper sense of the term, be recognized as a contestant before the House of Representatives. His position is somewhat analogous to that of any one who might choose to petition the House to refuse the admission of a member who presents himself with a certificate without any claim that the petitioner is entitled to the seat. In all such cases, the undersigned submits, the House should unquestionably refuse to act upon the petition or memorial either to refuse admission or to remove a member, unless the petition presented some question affecting the constitutional qualifications of members—such as that the party against whom the movement was instituted had not the requisite qualifications of age, residence, or citizenship. Under such circumstances, the House doubtless would and ought to entertain the memorial, and, after investigation of the facts, act on it accordingly. But this would not be a contested election, in the proper sense of the term. To receive and investigate such a memorial would be merely the exercise of the power given to the House to judge of the qualifications of its members. This power is fully admitted by the undersigned. Nor does he deny the right of any person to raise such questions touching the constitutional qualifications of members, either by memorial or otherwise. The House itself, without any petition or memorial, might properly raise the question themselves touching the constitutional right of any member to hold his seat upon the floor. But Governor Reeder raises no such question touching the constitutional qualifications of the undersigned. His allegations are, that the law under which the undersigned was elected, and certified to by the governor as the duly chosen delegate for Kansas, was invalid and void: because, as he affirms, the legislature that passed it were not properly elected themselves, and did not legislate at a proper place. These allegations raise questions relating not to the qualifications of the undersigned under the Constitution, or the returns of his election to this House, but relating to the qualifications and returns of the election of the members of the legislature of the Territory of Kansas, as well as the legality of their proceedings.

These are questions which the undersigned, *in the second place*, respectfully submits to the committee cannot properly be considered and decided by the House. Under the Constitution of the United States, each house of Congress is made the sole judge of the qualification and election returns of its own members. So in the several State legislatures and territorial legislatures, each house is the sole and absolute ultimate judge on these matters in their respective organizations. The law of the Territory under which the undersigned was elected he submits to the committee. It will be found on page 330 of the volume of the laws of Kansas published by authority. It was passed by the legislature organized in pursuance of an act of Congress, with which the committee and the country must be familiar. It bears upon its face the same verity, and has the same sanction of the regularly-constituted authorities, as the public laws of any of the States, or any of the other Territories. The undersigned, therefore, insists that the House cannot properly inquire into the validity of this law, upon the ground that the legislature which passed it was not properly elected. That is a question which another tribunal has the sole power absolutely to determine. The judgments of all courts of competent jurisdiction are conclusive upon all matters embraced in them, and are binding upon all parties. Their validity or invalidity cannot be inquired into by other courts. Every legislative body, in determining upon the qualifications and election returns of its members, acts in a judicial capacity. On such questions they sit as a court; and as their jurisdiction is full and complete over the subject-matter, so their decision must be final and conclusive. Otherwise the validity of any law of Congress might be assailed and inquired into in any of our courts, upon the ground that some or all of the members constituting one or the other branch of the law-making power were not properly elected. The House of Representatives, then, sitting as a court upon this matter now before them, can inquire into such facts relating to the validity of the laws of the Territory of Kansas, and such only, as any other court or judicial tribunal could inquire into upon the same point. As in determining upon the validity or constitutionality of a State law, they could not inquire into the qualifications and election returns of the members composing the legislature that passed it, so they cannot do it in this instance. The undersigned, therefore, submits, that the testimony proposed to be taken by Governor Reeder is not competent to prove the statements made by him.

out, were not deposited in the office of the county clerk. The territorial canvassers had no abstract but the original poll-books to canvass from. Your committee have not been able to perceive the force of the reasoning based upon these objections.

In fact, the territorial canvassers had more certain evidence before them than an abstract would have furnished. The poll-books were original papers, and abstracts copies, not of their letter, but substance. The poll-books were, therefore, as much superior to abstracts as originals are superior to copies. It has been strongly urged that the canvassing by the probate judge and householders is an additional attestation to the returns, and for that reason matter of substance. This may be so; but it is not apparent to us. The term "*canvass*," as used in the statute in question, means nothing more than count. The canvassers count the votes, as certified to in the poll-books, and embody in a single abstract the vote of the entire county for each candidate. The provision is one simply of convenience. It adds no solemnity, no security to the proceeding. The judge and householders attest nothing but their own count. In that they may be mistaken; the poll-books cannot be. How, then, can it be claimed that this count has any substantive or separate value? In the count there can be no revision. The judge and householders have power to reject nothing—to add nothing. They can correct no errors. Their count and abstract are based on what is returned to them through the clerk by the election officers. It seems to us that the objection resolves itself into this: That the territorial canvassers had better evidence before them than the law contemplated, and for that reason the vote must be rejected. We cannot admit the force of the reasoning, and without hesitation admit and count the vote of the county.

2d. *Dakota county.*—The vote of this county was rejected by the territorial canvassers upon the same ground which we have considered insufficient in the case of Otoe county. The contestant now alleges a different ground of objection, viz: that the return from Dakota county consists of a return from Omaha City precinct, whereas the precinct named in the governor's proclamation is Dakota precinct. It is not necessary to make a decision upon this point, inasmuch as the contestant appears to have a plurality, even if the majority against him in Dakota county is included.

3d. The vote of Washington county was also rejected. In this county there are three precincts—De Soto, Cuming City, and Fort Calhoun. The register made return to the office of secretary of the Territory of an abstract of the votes cast in the county; and, accompanying that abstract, he sent what he certified to be abstracts of the votes in the several precincts. Accompanying the abstracts from De Soto and Cuming City were certificates of the clerks, setting forth the fact that no poll-books were returned to the clerk; that from Fort Calhoun stating that no poll-book had been returned. These certificates accompanying the precinct abstracts are relied on to establish the proposition that no poll-books were returned from the precincts of De Soto and Cuming City. We are asked to follow the example of the territorial canvassers, and reject the whole vote of the county upon this showing. A part of the return made by the clerk—the county abstract—would have been in strict conformity with the law, and territorial canvassers could not have rejected it. Did the clerk's certificates to the precinct abstracts impeach his certified abstract of the county vote? We think not. The county abstract, under the law, was made by the probate judge and three disinterested householders; and all the relation that the clerk bore to it was that of official custodian. He certified it to the office of the secretary of the Territory, because it was a paper belonging to his office. This is all the power conferred upon the clerk by the act regulating elections. He can give copies, and certify them, of such papers as he has the official custody of, but his certificate of a fact is of no value as evidence. In other words, it is not evidence.

If the precinct officers neglect or refuse to return a poll-book to the county clerk's office, and return a tally-sheet or abstract, or send up the ballots, it is a fact to be established by some other kind of evidence than a certificate from the clerk of the county. Until the poll-books were sent in, the probate judge might have refused to canvass the precinct votes; but of that, he, and not the clerk, was the judge. When he did canvass and make his county abstract, it became the duty of the clerk to certify that, and that alone, and transmit it to the secretary of the Territory. That being done, his duty was performed, and his power over the subject ceased. His certificates of the non-delivery of the precinct poll-books were outside of his powers, and we reject them.

But as the contestant has argued as though the fact of the non-return of poll-books was proved, we will see if that vitiates the election. We think the fact is established sufficiently that a poll-book was kept at De Soto precinct, and deposited with the proper precinct officer. This being done, suppose we admit that nothing more than an abstract of the votes, as canvassed in the precinct, was sent to the clerk's office. The law requires this abstract to be sent there indorsed on the poll-book. The poll-book is nothing more than a list of the persons voting, and the whole omission is to return a list of voters for the precinct. Will it be seriously claimed that an omission by an officer to send a list of voters from a precinct, or from two precincts, as in this case, will disfranchise a whole county? We think not; and in conformity with precedents heretofore established, and in conformity with the principles of our own decision in the case of the contested seat from Maine, we count the vote.

4th. *Richardson and Pawnee counties.*—The vote of these counties was rejected by the territorial canvassers, and we are asked to follow their example. The sitting delegate has filed with us copies of two newspapers, for the purpose of showing the reasons which controlled the judgment of the territorial canvassers. If they express any reasons, they are these: that there were some illegal votes polled in the county, and the county canvassers, the probate judge, and householders, saw fit, for that reason, to refuse to give a candidate for county treasurer a certificate of election. This was regarded as a precedent for rejecting the vote of the county.

It is further claimed, that if we will not set aside the whole vote, we must set aside a part of it. It is claimed that some twenty persons voted who were residing on an Indian reservation known as the "Half-breed tract." If the returns from the county show anything, it is that the county canvassers refused to count the votes of settlers on the "Half-breed tract." They so certify, at least; and although we do not express the opinion that their certificate does or can prove anything on that subject, yet it is all the proof we have on the point. The sitting delegate assures us that these votes were counted, because in the return of votes for county officers the canvassers say in a note that "*no certificate was given for treasurer, A. Shelley having received the votes on the half-breed land.*" This, we think, proves nothing on the subject of counting these votes for delegate to this body. These votes may have been counted, but certainly the evidence does not say so. In every instance where the evidence speaks on the subject, it bears testimony against their having been counted. The returns say these votes were deducted from the poll for delegate to Congress; and again, the returns say that the county canvassers would not recognize the election of a county treasurer because he received them. The canvassers seem to have refused to recognize these votes anywhere, and to have expelled them wherever met with.

But if we admit the supposition that these votes, which, it is agreed, were cast for the contestant, were counted for him, and are included in and form a part of the aggregate vote for him in the abstract from Richardson county, does it aid the sitting delegate? We think not. We think the settlers on this reservation had a right to vote, and to vote for the contestant.

It is claimed that the reservation is not in any election precinct, and that by the tenth section of the act regulating elections, voters can exercise the elective franchise in the precinct where they reside, and nowhere else. We will not say that voters can exercise the right of suffrage in any place except the precinct of their residence, but this case certainly does not show this reservation to be outside of any election precinct. It may be that it is not included in any election precinct, but the fact is not shown. The only evidence bearing on the point is the governor's proclamation. In that, he says that the precincts in Richardson county are Archer and Salem. He does not define their boundaries, but says they shall be defined in the notices of the probate judges. We are not shown the notices of the judges, and cannot say how they bounded these two precincts. It seems to be an admitted fact, that all this reservation lies in Richardson county. But it is not alluded to in the governor's proclamation, and no terms of exclusion are used that apply to it.

The next objection is, that under the law of Congress, approved 30th of June, 1834, to regulate trade and intercourse with the Indian tribes, &c., which is in force in the Territory, these settlers could not become inhabitants of the reservation—that they were trespassers upon Indian lands. We will not deny the proposition that they were trespassers, yet they were inhabitants of the Territory, and, for aught that appears, they were citizens of the United States. Holding this relation to the government, they were voters, and did not forfeit their rights as voters by the commission of a trespass.

It is said that they were excluded by the governor from the census, and not allowed to form any part of the basis of the apportionment in his proclamation. We understand this to be true, but no consequences follow the act of exclusion. The governor cannot give to or take from the inhabitants of the Territory the least of all their civil rights. The right of suffrage, with all other civil and political rights, they hold by the law of the land, and not by the grace of any functionary, high or low. We cannot, for this reason, deny to these people the right to vote. In fact, when objection is raised to the exercise of the right of suffrage, we hold the objector bound to show the disability, and we give to the voter the benefit of all presumptions and legal intendments.

Another objection, though it seems to be abandoned in argument, was originally taken to these votes. It is, that this reservation forms no part of Nebraska. It was claimed that the law organizing the Territory excluded it. The provision of the act relied on is in these words:

> That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory.

It is only necessary to remark on this point, that the half-breed reservation is not of the character of the Indian reservations provided for by the clause of the act we have quoted. It is a tract of land set apart by the treaty of July 15, 1830, entered into between the United States and certain Indian tribes at Prairie du Chien. In the tenth article of that treaty the Omahas, Iowas, and Otoes, for themselves, and in behalf of the Yancton and Santee bands of the Sioux, with the consent and by agreement with the United States, set apart these lands as a provision for their half-breeds, who are to "*be suffered to occupy*" the same, "*holding it in the same manner, and by the same title, that other Indian titles are held.*" Besides these provisions, the President of the United States had the power conferred on him to assign portions of these lands to any of the individual half-breeds, not exceeding a section to an individual, to be held in fee simple. This is only a grant of the land itself to individuals, and not a grant to them as a band or tribe. There is no grant or acknowledgment of sovereignty in the article. There is no stipulation in any part of the

treaty that these lands shall not be included in a State or Territory. We find in this treaty no foundation for this objection.

The next objection raised to counting the vote of these counties for the contestant is, that the clerk, in the abstract sent to the office of the secretary of the Territory, stated the votes as given to Henri P. Bennet, and not to Hiram P. Bennet, the contestant. This objection would be formidable if that abstract was all the evidence on the point. But it is not. A certified copy is exhibited to us from the election-book of the county, which shows that in the abstract made by the county canvassers and recorded in the election-book, the votes are stated to have been given to H. P. Bennet. In addition to this, the sitting delegate, in his answer, admits the votes to have been given to the contestant. In this state of the case, without referring to the parol evidence taken by the contestant, we find no difficulty in reaching the conclusion that the return sent to the secretary's office was made to read Henri P. Bennet by mistake. We therefore overrule this objection to the return from the counties of Richardson and Pawnee.

Your committee, therefore, submit the following resolutions:

Resolved, That Bird B. Chapman is not entitled to a seat in this body as delegate from the Territory of Nebraska.

Resolved, That Hiram P. Bennet is entitled to a seat in this body as such delegate.

MINORITY REPORT.

MAY 13, 1856.

Mr. STEPHENS, from the Committee of Elections, made the following report:

The undersigned, member of the Committee of Elections, not having been present when the case of Hiram P. Bennet, contesting the seat of Bird B. Chapman, the sitting delegate from the Territory of Nebraska, was acted upon by the committee, and not concurring with them in the conclusions to which they arrived in their report, asks leave to submit, on his part, the following statement of the facts of the case as he understands them:

The election in the Territory of Nebraska for a delegate to Congress was held on the 6th day of November, 1855, in pursuance of a proclamation of the governor, under a territorial law. There are in that Territory ten counties, viz: Richardson, Pawnee, Nemaha, Otoe, Cass, Douglas, Washington, Burt, Dakota, and Dodge.

In these counties election precincts, or places for voting, were established by a proclamation of the governor issued 15th day of October, 1855, as follows, viz: In the county of Richardson, at Archer and Salem; in Pawnee, at Pawnee; in Nemaha, at Brownville; in Otoe, at Nebraska City, Bennet's Ferry, and Wyoming; in Cass, at Rock Bluff and Plattsmouth; in Douglas, at La Platte, Belleview, Omaha City, and Florence; in Washington, at Fort Calhoun, De Soto, and Cuming; in Burt, at Tekamah; in Dodge, at Fontanelle and Elkhorn City; in Dakota, at Dakota City. And, in the same proclamation, the probate "judges in the several counties," if they had "failed or omitted to discharge the duties required of them by the sixth section of an act regulating elections, approved March 16, 1855, were required forthwith to cause a notice to be posted up in three of the most public places in the several precincts, within their respective counties, clearly defining the boundaries and designating the place of holding the election in each precinct," &c., "and also to do and perform all other acts enjoined by said act regulating elections."

The territorial act of March 16, 1855, contains the following clauses:

SEC. 4. The judges of probate shall respectively, at least forty days before the general election, appoint three judges of election, having the qualification of electors, at each election precinct, and shall cause written notice of said appointment to be given to said judges at least ten days previous to such election.

SEC. 5. The said judges shall choose two clerks having *similar qualifications* as themselves, who, together with the said judges, shall constitute the *board of election*, and the said board shall hold their offices until their successors are appointed; and in case of any vacancy, the same shall be filled by the remaining members of the board.

SEC. 6. The several judges of probate shall, at least thirty days previous to any general election, cause three written notices thereof for each election precinct to be posted up in each election precinct, which notice shall contain a list of all the officers to be balloted for at said election, and in case of an especial election the above notice shall be given eight days previous to such election.

On the 23d of November, 1855, the returns for all the counties were opened by the board of territorial canvassers under the law, who made the following report of the state of the polls in the counties named:

DELEGATE TO CONGRESS.

County.	Bird B. Chapman.	Hiram P. Bennet.	Joseph Dyson.	Henry Smith.	Charles B. Smith.	J. M. Thayer.	N. Giddings.
Douglas	259	123	.....	.....	.....	.....	.....
Nemaha	57	56	.....	.....	4	.....	1
Cass	33	94	.....	4	.....	.....	.....
Dodge	17	.....	7	.....	.....	.....	.....
Burt	14	19	.....	1	.....	1	.....
	380	292	7	5	4	1	1

The other counties were rejected for informalities and irregularities which will be noticed hereafter in detail.

By the returns above, from which it appears that the sitting delegate has a majority of eighty-eight votes, they reported his election to the governor of the Territory, who thereupon awarded him a certificate of election; a copy of which is annexed to this report, marked A.

Touching the correctness of the decision of the canvassers as to the counties above named, and the returns therein set forth, the undersigned does not understand the contestant to raise any objection. The facts in relation to the other rejected counties, viz: Dakota, Washington, Otoe, and Richardson, seem to be these: in Dakota county the polls stood, for Bird B. Chapman, twenty-five votes, and none for any other candidate. These the canvassers rejected. The reasons for their rejection were not assigned by them in their report to the governor. But, from the papers submitted to the committee, it seems they were liable to two objections. In the first place, the only returns from that county were of an election held at *Omaha creek*, and not at Dakota City, the only place appointed and established in conformity to law for holding elections in that county. And in the second place, no certificate or abstract of the county or probate judge, as required by law, accompanied the return. It was sent up by those who acted as clerks of the election.

By section 14 of the territorial act of March 16, 1855, regulating elections, it is provided that "at the close of the canvass one of the poll-books and all the

ballots cast shall be delivered to one of the judges for safe-keeping, and the other poll-book, securely enclosed and sealed, shall be, within five days thereafter, transmitted to the county clerk." And section 15 is in these words: "On the reception of said returns by said clerk, the *judge of probate*, together with three disinterested householders, chosen by him, shall open said returns, and *make abstracts of the votes cast* for each several office at said election." These abstracts are the returns which the several probate judges are to make to the territorial canvassers; but in the county of Dakota there does not seem to have been made any such return as that required by law, and such as the probate judge of the county could canvass or give any *abstract* or *certificate* of.

The importance of this will appear when it is recollected that by sections 4 and 5 the judges of probate are by law required to appoint the judges of elections at each precinct. A paper, therefore, purporting upon its face to be the return of an election at any precinct without the sanction of the probate judge of the county, wants that authenticity which is essential to its validity. For these reasons the undersigned is of opinion that the territorial canvassers acted rightly in rejecting the return for Dakota county. But if it should be taken into the account the poll would then stand thus:

Chapman's majority above	88
Vote in Dakota added	25
Increasing his majority to	113

Otoe county stands in a similar condition touching the returns. In this county, as before stated, there were three precincts, viz: Nebraska City, Bennet's Ferry, and Wyoming. According to law, the judges of the elections held at these various precincts, who ought to have been appointed by the probate judge of the county, and who, with their clerks, by the said fifth section of the act before cited, constituted the board of election, should have made their return to the county clerk, as required by section 14, to have been there examined, consolidated, and certified to by the probate judge of the county, &c., in accordance with section 15 of the same act. But this was not done. The territorial canvassers had nothing before them but several papers purporting to be returns from the several precinct elections for Otoe county, signed by persons purporting to act as judges of elections and clerks of election. But there was nothing accompanying the papers showing that they had any authority so to act; that they were the judges legally appointed to hold said several elections. This requirement of the law, that the probate judges shall canvass and certify to the county returns by his abstract, the undersigned deems of essential importance. It is this which gives authenticity to any return; and without it he thinks the return from Otoe county was properly rejected by the canvassers. But if it should be counted, the result would then be as follows:

For Bennet	176
For Chapman	95
	81

Giving Bennet 81 majority, which, deducted from Chapman's previous majority of 113, leaves the poll thus far as follows:

Chapman's majority, stated before	113
Bennet's majority in Otoe deducted	81
Majority still for Chapman	32

The next of the rejected counties is Washington. In this county there were three precincts, viz: Fort Calhoun, De Soto, and Cuming. In this county the *abstract* was made out and certified to by the register of deeds of the county,

and not by the *probate judge*, as the law required; and the register, in giving the certificate of the abstract, states that no poll-books had been returned from the precincts of Cuming City and De Soto. This the law positively required; and its importance will be readily seen, when it is recollected that it is by the poll-books mainly that the names of those who vote illegally can be ascertained. The undersigned is of opinion that the *unauthenticated* returns of this county were properly rejected by the territorial canvassers. The vote, as returned, stood for Bennet 44, and Chapman 39—giving Bennet 5 majority; so that, if it should be counted, the poll would then stand thus:

Chapman's last majority, stated above	32
Bennet's majority in Washington deducted	5
Leaving Chapman still with a majority of	27

In the county of Pawnee no election was held.

The returns from the county of Richardson are subject to objections of a different and a more insuperable character still. Polls, it seems, were opened at three places in this county, viz: at Henry Abrams's, Salem, and Archer. At only one of these precincts, viz: Salem, was the board of election properly constituted. At Henry Abrams's the voting was without any authority. The same was the case at Archer; though this place was established as a precinct in the governor's proclamation, yet the probate judge of the county, believing it to be situated within the limits of the half-breed Indian lands, refused to give notice of an election there, or to appoint any board of election. This will appear by the deposition of Hon. Joseph L. Sharp, hereto annexed, marked B. But as it was ascertained, shortly before the election, that the town of Archer was in fact not on the half-breed lands, it was determined to hold an election anyhow. Persons assumed to act as judges of election, and clerks were appointed without the requirements of the law. This is quite sufficient of itself, according to well-settled principles, repeatedly established by this house, for the rejection of the entire poll at Archer. In the case of James Jackson *vs.* Anthony Wayne, of Georgia, 1st session of the 2d Congress, it was decided by this house that when the law regulating the election required that "three *magistrates* should preside at the election, a return by three *persons*, two of whom were not magistrates, was defective." In the case now under consideration the law required "three *judges of election to be appointed by the county probate judge*." But the persons who assumed to act as such at the Archer precinct had no such authority; and the votes taken by them cannot be regarded in any other light than votes received by any other irregular body of men unknown to the law, acting voluntarily without any legal authority. In the case of Easton, contesting the seat of Scott, the delegate from the Missouri Territory, at the 2d session of the 14th Congress, it was decided by this house that where an "election is required by law to be held by three judges who are to be sworn, and it is held by *two* not sworn, their proceedings are illegal, and the votes taken by them are to be rejected."

These principles the undersigned holds to be sound and correct. And according to them the territorial canvassers were, as it seems to him, bound to reject the returns for the election held at Henry Abrams's and at Archer, without any reference to other informalities attending them; and upon the same principles this house should also reject them.

The contestant in this case, in a paper filed with the committee, says that "the right of suffrage under our form of government is a great, sound, and paramount right, and not to be lost by the errors, omissions, or neglect of subordinate officials." The undersigned cannot agree with the contestant in the extent to which he asserts the doctrine in this proposition. The right of suffrage, great and inestimable as it may be, is nevertheless a right regulated and qualified by

law; indeed, it can only be properly exercised in conformity to the requirements of law. Without these, it would soon cease to be valuable.

The polls at the various precincts in Richardson county stood as follows:

	Bennet.	Chapman.
At Henry Abrams's	15	9
At Salem	21	21
At Archer	40	6
	76	36

The vote at the only legal election held in the county being equal, the rejection of the other two precincts leaves the aggregate result of twenty-seven majority for Chapman in the entire Territory, as before stated. But in reference to the poll at Archer, there are graver objections still, at least to a part of the vote entering into the count of forty for Bennet. Of these forty for Bennet, nineteen, as appears from the deposition of Mr. Sharp referred to before, were residents upon the half-breed Indian lands, and not within the civil jurisdiction of the territorial authorities of Nebraska. The letter of the Commissioner of Indian Affairs, with the treaties and laws referred to by him, the undersigned deems conclusive on this subject. The Commissioner's letter will be found among the papers on file already printed in the report of the majority.

But besides the views there presented, it appears from the evidence of Mr. Sharp that these people did not themselves claim to be within the civil jurisdiction of the Territory. They refused to pay taxes, or to have their property assessed; and as great and inestimable as the right of suffrage may be, and is, those who refuse to contribute their quota of the public burdens of the government certainly cannot complain of being deprived by that government of having a voice in its councils. It moreover appears by the proclamation of the governor, on file and printed in the majority report, that the residents upon the half-breed Indian lands were excepted from the civil jurisdiction of the county of Richardson. They did not come within the limits or proper boundaries of any election precinct organized under the territorial law; and, according to that law, section 10, no one, not even a legal voter, is permitted or entitled to vote out of his election precinct. From these considerations the undersigned is clearly of opinion, if all the other returns in all the counties and precincts in the Territory should be received, notwithstanding the irregularities and fatal defects in law attending some of them, that these nineteen votes taken at Archer should be rejected; the result then would be—

Chapman's majority, as before stated		27
Chapman's vote in Richardson		36
		63
Bennet's vote in Richardson	76	
Less the 19 illegal votes at Archer	19	
		57
		6

Leaving Chapman an unquestionable majority of six of the legal voters, upon the assumption that none but legal votes were cast at the other polls. But, from the deposition of honorable Joseph L. Sharp, it will be seen that a number of other illegal votes, *four* certainly, and *prima facie seven*, were cast for Bennet at the Archer precinct, in Richardson county, besides the nineteen residents on the half-breed lands. The only six votes cast for Chapman at Archer,

as appears from his deposition, were legal votes. The same also appears in the deposition of E. S. Sharp, hereto appended, marked C.

It appears, from the deposition of honorable Joseph L. Sharp, that the nineteen illegal votes alluded to, whose names are all given in the deposition, were cast for Bennet.

From the deposition of P. C. Sullivan, also appended, marked D, it appears that great irregularities attended the election at the De Soto precinct, and that nine illegal votes, whose names are specifically given, were cast at said precinct for Bennet, the contestant.

Mr. Sullivan, it appears, was the Speaker of the House of Representatives, and his testimony should be received with great weight. The deposition of P. G. Cooper, marked E, shows also irregularities attending the election at the same precinct; but Mr. Joseph L. Sharp states also that one of the clerks at this precinct was a non-resident of the Territory, which, of itself, was enough to vitiate the entire return, according to the territorial law, before cited. These facts abundantly show the propriety of the action of the territorial canvassers in rejecting the entire poll of the De Soto precinct. The vote at that poll stood, 36 for Bennet, and 7 for Chapman.

But the result of the whole matter is, if all the votes in the Territory should be counted as claimed by the contestant, with the exception of the nineteen illegal votes cast for him at the Archer precinct, in the county of Richardson, by residents on the Indian reserve, it would still leave Chapman with a clear majority of six, and the vote by counties will stand as follows:

	Bennet.	Chapman.	Others.
Douglas county	123	259	....
Burt county	19	14	1
Dodge county	....	17	7
Cass county	94	33	4
Nemaha county	56	57	4
Washington county	44	39	....
Dakota county	....	25	....
Otoe county	176	95	19
Pawnee county	....	....	....
Richardson county	76—19=57	36	....
	569	575	35
		569	
Majority for Chapman		6	

And if the four certain illegal votes, other than the residents on the half-breed Indian lands, cast for Bennet at Archer, according to the testimony of J. L. Sharp, and the nine certain illegal votes cast for him at De Soto precinct, in the county of Washington, according to the testimony of Mr. Sullivan, be also deducted, as they ought to be, from the evidence, then Chapman's majority of the legal voters of the Territory, as appears from all the testimony and returns in the case, will be nineteen.

All of which is respectfully submitted.

ALEXANDER H. STEPHENS.

On the 22d day of July the House voted, after a brief debate confined strictly to the points stated in the reports, that Mr. Chapman, the sitting delegate, was entitled to his seat—69 to 63.

NOTE.—The speeches upon this case will be found in volume 32, part 3, of the Congressional Globe [illegible] majority report: Mr. Watson, page 1688. Against: Mr. Jewett, page 1713; Mr. Stephens, page 1714.

THIRTY-FOURTH CONGRESS, THIRD SESSION.

CLARK *vs.* HALL, *of Iowa.*

An informality in a county abstract of votes is not sufficient cause for its rejection.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 4, 1857.

Mr. BINGHAM, from the Committee of Elections, made the following report:

It appears from the canvass of the State canvassers of Iowa that the sitting member received one hundred and seventy-seven more votes than the contestant, of the votes which they received and allowed.

The State canvassers, by the laws of Iowa, canvass abstracts furnished by certain county officers of the votes thrown in the several counties.

Objections are made in this case, both to alleged informalities in these county abstracts and to their alleged want of correspondence with the state of the votes as actually cast in the voting precincts.

In conformity with the principles acted upon by your committee in the case of the contested seat of the delegate from the Territory of Nebraska, your committee would not reject for mere informality a county abstract which truly presents the aggregates of the votes actually cast in the voting precincts.

In this case there is evidence that legal votes actually cast both for the contestant and the sitting member are not embraced in the county abstracts. It does not, however, sufficiently appear that the corrections authorized by the evidence would so far change the result as to give the contestant as many votes as the sitting member received.

In view, however, of the many irregularities and errors in the returns of votes, your committee believe that the contestant has prosecuted his claim to a seat in the House in good faith, and because he felt called upon to do so by a regard for his own rights and the rights of those who had given him their suffrages.

The hearing of the case before the committee was suspended on the 6th day of last May, by an agreement of the parties entered into with the view of procuring additional testimony.

Considering all the facts and circumstances in the case, your committee recommend to the House the adoption of the accompanying resolution:

Resolved, That Hon. Augustus Hall was legally and duly elected as the representative of the first congressional district in the State of Iowa for the 34th Congress.

The House agreed to the resolution without debate or division.

THIRTY-FOURTH CONGRESS, THIRD SESSION.

REEDER *vs.* WHITFIELD, *of Kansas.*

Mr. Whitfield was returned to Congress by the legislature of Kansas, and, after considerable debate, was permitted to be sworn in and take his seat during the contest. The same questions were raised in this contest that were settled in the previous Congress, together with the new one that the governor of Kansas Territory had no legal authority to order a special election. The House rejected the report of the committee, and Mr. Whitfield retained his seat.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 12, 1857.

Mr. ISRAEL WASHBURN, jr., from the Committee of Elections, made the following report:

The sitting delegate from the Territory of Kansas bases his claim to his seat upon an election held in October, 1856, in pursuance of a proclamation fixing the day of the election, issued by the governor of the Territory of Kansas, and which said election was conducted according to "an act to regulate elections," enacted in 1855, by a body of men claiming to be the legislature of Kansas, and which derived its existence from an election held in that Territory on March 30, 1855.

It appears from the report of the special committee, appointed by this house, during its first session, to investigate the affairs of Kansas, that the territorial legislature, claiming to have been chosen at the election of March 30, 1855, "*was an illegally constituted body, and had no power to pass valid laws, and their enactments are, therefore, null and void.*" In this conclusion of the special committee, this house has manifested its own concurrence by many decisions and on many occasions. It is supported by an array of evidence which has never been successfully assailed, and which constitutes one of the darkest pages in American history. To admit the legality of the so-called territorial legislature of Kansas would be to sanction fraud, violence, and perjury, combined and systematized upon the most gigantic scale, and for the most corrupt objects.

It is a fatal objection, therefore, to the claim of the sitting delegate to have been elected in pursuance of law, that he bases it upon an election held under the direction of officers deriving their authority from an usurping legislative body, and regulated by laws emanating from the same vicious source.

If, however, it can be assumed that the legislature of the Territory of Kansas elected on the 30th of March, 1855, was a lawfully constituted body, another and equally fatal objection remains to the claim of the sitting delegate.

In the thirty-second section of the act of Congress of 1854, organizing the Territories of Nebraska and Kansas, the following provision was made for the election of delegates to Congress from the Territory of Kansas:

> The first election shall be held at such time and places, and be conducted in such manner, as the governor shall appoint and direct; and at all subsequent elections the times, places, and manner of holding the elections shall be prescribed by law.

By this provision of the organic act constituting the Territory of Kansas, the power of the governor to prescribe the time of electing a delegate to Congress was limited to the first election, which took place in October, 1854, and it was expressly declared that "*at all subsequent elections the times, places, and manner of holding the elections shall be prescribed by law.*"

It being manifest, therefore, that the governor of Kansas was not authorised by anything in the organic act constituting the Territory of Kansas to issue his proclamation for an election of a delegate to Congress in the month of October last, it remains to be considered whether any such authority has ever been conferred upon him by the (so-called) territorial legislature of Kansas.

The first section of "An act to regulate elections," enacted in 1855 by the (so-called) territorial legislature of Kansas, embraces all the legislation of that body on that subject, and is in the following words:

> On the first Monday in October, in the year one thousand eight hundred and fifty-five and on the first Monday in October every two years thereafter, an election for delegate to the House of Representatives of the United States shall be held at the respective places of holding elections in the Territory of Kansas.

There is neither in this section nor in any other part of the code of laws enacted by the (so-called) territorial legislature of Kansas any provision for the election

of a delegate to Congress to fill a vacancy. Nowhere is authority given to the governor to fix a day by proclamation for the choice of a delegate to Congress to fill a vacancy. The proclamation actually issued by the governor for the election of last October had no legal validity whatever, or even color of legal validity. No citizen of Kansas was bound to pay any attention to it, or is to be concluded or prejudiced as to any right whatever by refusing to take notice of this proclamation.

The authority of the governor of Kansas to issue his proclamation for the election in October last was denied and repudiated by the great majority of the people of Kansas, and this of itself, and without reference to other considerations, was a sufficient reason for their refusal to participate in the illegal and pretended election held under it.

The sitting delegate, having no claim to his seat on the ground of having been elected in pursuance of law, might still be allowed, as a matter of indulgence and discretion, to retain his seat, if it sufficiently appeared that his election was in fact concurred in by a majority of those who are, or ought to be, the legal voters of Kansas. No such thing, however, appears; but, on the contrary, all the circumstances and evidence in the case point irresistibly to an opposite conclusion.

The election at which the sitting delegate claims to have been chosen was conducted by the officers, and under the regulations prescribed in "An act to regulate elections," passed by the (so-called) territorial legislature in 1855, and it becomes necessary to examine some of its provisions.

By the fifth section of this act the election judges derive their appointment, not from the governor or from the people, but from boards of county commissioners, who were themselves appointed, not by the governor or people, but by the usurping and pretended legislative body elected on the 30th of March, 1855. It is safe to infer the character of these election judges, and the purposes for which they were selected, from the sources to which they owe their appointment.

By the fourth section of this act the boards of county commissioners are authorized to establish new election precincts down to the day of election, and even on the day of election itself. By the ninth section of this act the election judges are authorized to adjourn the elections to the next following day. These two provisions, it is manifest, afford great and tempting opportunities for fraud.

The eleventh section of this act, prescribing the qualifications of voters, requires no term of previous residence in the Territory, not even one single hour. In connexion with the twentieth section of the act, it authorizes any person to vote, at the pleasure of the election judges, who will swear that he is an inhabitant. This last section authorizes the election judges, at their discretion, to receive evidence as to the qualifications of voters, or to examine the voter "*touching his right to vote; and if so examined, no evidence to contradict shall be received.*" The privilege of swearing in their votes is not accorded to all persons offering their votes. This would be impartial, whatever might be thought of its justice or policy. The privilege is, in fact, granted or withheld, at the unrestrained discretion of the election judges.

The eleventh section of this act is as sweeping in its exclusions as it is in its admissions. While it gives the right of suffrage in Kansas to every citizen of Missouri who is weak, ignorant, or reckless enough to swear that he is an "*inhabitant*" of Kansas, it excludes from the right of suffrage every person who will not, upon being thereto required, take an oath, or affirmation, to "*sustain the provisions*" of the acts of Congress of February 12, 1793, and of September 18, 1850, providing for the rendition of fugitive slaves; and also of the act of Congress of May 30, 1854, to organize the Territories of Nebraska and Kansas. This is a test oath of the most odious character, and operates to exclude from the exercise of the right of suffrage large numbers of the people of Kansas. All

test oaths are odious, and opposed to the principles and traditions of American liberty. They have been the ready resorts of tyranny in all ages and countries. They oppose no barriers to the unscrupulous, while they repel men of tender consciences. This is believed to be the first instance in this country in which a successful political party has attempted to exclude its opponents from the right of suffrage, by a party shibboleth, in the form of a test oath. It deserves the severest condemnation at the hands of all who cherish the forms and substance of free institutions. No countenance should be given to elections tainted and polluted by it.

Looking merely to the provisions of this Kansas "act to regulate elections," and without the aid of any testimony as to its practical working, the conclusion would be irristible that no faith and credit are due to proceedings under it, but that everything should be presumed against them.

There is, however, abundant testimony as to the practical working of the (so-called) election laws of Kansas.

Among the conclusions arrived at by the special committee appointed by this house, during its first session, to investigate the affairs of Kansas, and supported by an overwhelming array of evidence, were the two following:

That each election in the Territory, held under the organic or alleged territorial laws, has been carried by organized invasion from the State of Missouri, by which the people of the Territory have been prevented from exercising the rights secured to them by the organic law.

That in the present condition of the Territory, a fair election cannot be held without a new census; a stringent and well-guarded election law; the selection of impartial judges, and the presence of United States troops at every place of election.

That large numbers of persons in Kansas are, in fact, restrained from the exercise of the right of suffrage, by the test oaths imposed by the pretended election law in that Territory, is proved by the remonstrances of twelve hundred and sixty-six legal voters of Kansas against the right of the sitting delegate to hold his seat. These remonstrances declare:

The legislature so elected made certain enactments not only at variance with the organic act, but with the Constitution of the United States, and among them *an election law which effectually debars us by the interposition of test oaths from seeking a remedy through the ballot-box.*

The contestant, A. H. Reeder, in his memorial declares:

In the month of October, 1855, the said J. W. Whitfield and your petitioner were candidates for the office of territorial delegate to the present Congress at two separate elections, when your petitioner, as appears from the report of a special committee of your honorable body, received more than double the number of legal votes cast for the said J. W. Whitfield. That upon a full investigation of all the facts relative to said elections, the House rejected the said J. W. Whitfield, but refused to admit your petitioner. The reasons for this action, as appears plainly from the debates of the House, were that the said J. W. Whitfield was in a minority of the popular vote, and had been elected under a void election law, and that your petitioner, although having a large majority of the popular vote, had been elected without any law declaring the time and manner of election.

Without any new legislation, and under the same state of things, the said J. W. Whitfield again became a candidate for a single session of the same Congress at an election held in October, 1856, entirely without the authority of law, in which a large majority of the voters of the Territory refused, for that and other reasons, to participate. They respected the decision of your honorable body, so recently made, refusing to recognize a voluntary election, and therefore abstained from a proceeding which could only result in a second presentation of an adjudicated question, and involving a disrespect of the authority and action of the House.

The persons who did participate in this irregular, unauthorized, and illegal election, were a small number of the voters of the Territory, considerably less than those who voted at the voluntary election of October, 1855, and a large number of non-residents of the Territory, and persons not entitled to vote. Upon the result of this election only the said J. W. Whitfield has been admitted to, and now occupies, his seat in the House.

This election, as already stated, was purely voluntary on the part of those who participated in it, and without the semblance or color of law, congressional or territorial, valid or invalid, to authorize or justify it.

Upon the whole case, your committee are of opinion that any election held under the (so-called) election law of Kansas must necessarily be fraudulent,

and is entitled to no credit anywhere; that the act of the governor of Kansas in ordering a special election of a delegate to Congress in the month of October last was done without any lawful authority, or color or pretence of lawful authority; and that there is no evidence in the case showing, or tending to show, that the sitting delegate was, or is, the choice of a majority of the *bona fide* voters of the Territory of Kansas, but that all the probabilities are the other way.

In reference to the request of A. H. Reeder to be admitted to a seat as a delegate from Kansas, it is a request addressed to the discretion of the House, and your committee are not prepared, upon the evidence submitted, to recommend that it be granted.

Your committee recommend the adoption by the House of the following resolution:

Resolved, That John W. Whitfield is not entitled to a seat in this house as a delegate from the Territory of Kansas.

Minority report in the contested election between A. H. Reeder and John W. Whitfield.

In the matter of the memorial of A. H. Reeder, contesting the right of John W. Whitfield to a seat in this house as a delegate from Kansas Territory, the undersigned, members of the Committee of Elections, beg leave to submit the following minority report:

The undersigned, after the most careful examination of the whole subject in all its bearings which they have been capable of giving to it, find themselves wholly unprepared to concur with the majority of the committee in the conclusions at which they have arrived in their report; but, on the contrary, shall maintain that they are unauthorized by the facts and circumstances in the case and the law arising thereupon.

It is true, as stated by the majority of the committee, that "the sitting delegate from the Territory of Kansas bases his claim to his seat upon an election held in October, 1856, in pursuance of a proclamation, fixing the day of the election, issued by the governor of the Territory of Kansas, and which said election was conducted according" to the election laws enacted by the legislature of Kansas Territory in 1855, "and which derived its existence from an election held in that Territory on the 30th of March, 1855." But the undersigned utterly deny that it "appears from the report of the special committee, appointed by this house during the first session to investigate the affairs of Kansas, that the territorial legislature, claiming to have been chosen at the election of March 30, 1855, was an illegally constituted body, and had no power to pass valid enactments," and that, therefore, their enactments are null and void. On the contrary thereof, they affirm, that upon a strict examination of the testimony taken before said special committee it will appear most manifestly, to any unprejudiced mind, that the election of March, 1855, for members of the legislature, was not carried either by "fraud," "force," "violence," "threats," or "perjury," as alleged by the majority of the committee, but that a majority of the legislature was duly elected by a majority of the *bona fide* residents of the Territory, as certified to by A. H. Reeder, then governor of the Territory of Kansas, and now the contestant of John W. Whitfield for a seat in this house. Meanwhile, however, the undersigned would not be understood as denying that there may have occurred, in some instances, in connexion with the election of the 30th of March, 1855, "fraud, violence, and perjury combined," but the undersigned utterly deny that the testimony taken by the Kansas Investigating Committee even tends to show that "fraud, violence, and perjury" were combined and systematized upon the most gigantic scale, and for the most corrupt objects,

as charged by the majority of the committee. They can but regard the assertion as a gratuitous assumption and as having no legitimate basis upon which to rest—none whatever.

Admitting, however, for the sake of the argument, that "fraud, violence, and perjury" did, in some few instances, occur in the Territory of Kansas in connexion with the election of the 30th of March, 1855, still, the undersigned maintain that a very large majority of the legislature were elected by a majority of the actual *bona fide* settlers or residents of the Territory; and that, therefore, the laws enacted by that body are valid and binding upon all until annulled and held for naught by the judicial tribunals of the country.

But, say the majority of the committee, "if, however, it can be assumed that the legislature of the Territory of Kansas, elected on the 30th of March, 1855, was a lawfully constituted body, another and equally fatal objection remains to the claim of the sitting delegate."

Now, what is that "fatal objection?" As appears in their report it is this: That neither the act of Congress organizing the Territory of Kansas, nor yet the election laws enacted by the Kansas legislature, authorized the governor of the Territory to issue his proclamation for an election of a delegate to Congress in the month of October, 1856.

In answer to this objection, whilst the undersigned admit that neither the organic act nor the laws enacted by the territorial legislature contain any such authoritative provisions in express terms, still they cannot readily concur with the majority of the committee in the conclusion that, in the absence of such provisions, either in the organic act or the laws passed by the territorial legislature, it necessarily follows that the proclamation of the governor, ordering the election held in October, 1856, was unauthorized and void, and that, consequently, the election of the sitting delegate was null and void from the beginning; but, on the contrary thereof, the undersigned would suggest, for the consideration of the House, that, inasmuch as the organic act secures to the people of Kansas Territory the right of electing a delegate to represent them in Congress, they should not be held to have lost this high privilege merely because the territorial legislature omitted to pass an act prescribing "the times, places, and manner of holding the elections," which they were authorized to do by the following provision in relation to the election of delegates to Congress from the Territory of Kansas, as contained in the thirty-second section of the act of Congress of 1854, organizing the Territories of Kansas and Nebraska, to wit: "The first election shall be held at such time and places and be conducted in such manner as the governor shall appoint and direct; and at all subsequent elections the times, places, and manner of holding the election shall be prescribed by law."

In this connexion the undersigned deem it proper to state that the first election for a delegate to Congress from Kansas Territory was held in the month of October, 1854, in accordance with the provisions of the law just quoted; the second in the month of October, 1855, in accordance with the provisions of the laws enacted by the Kansas legislature. At which second election John W. Whitfield, the sitting delegate, was chosen for two years, and, in pursuance thereof, took his seat in this house at the opening of the last session of Congress as the delegate from the Territory of Kansas; but his right to his seat was contested by A. H. Reeder, the contestant in this case, and he, Whitfield, was, during the session, ousted from his seat by order of the House—thus creating a vacancy in that office.

To fill this vacancy the governor of said Territory, very properly, as the undersigned believe, issued his proclamation, as before stated, ordering an election to be held on the first Monday of October, 1856, which was done accordingly. At that election there was but one candidate, the sitting delegate, and he received 4,300 votes, which was unquestionably a large majority of the legal

voters of the Territory. Besides, at this election, there is no evidence even tending to show that any illegal votes were cast for the sitting delegate; nor is such a thing even pretended by the majority of the committee. Indeed, it could not be so pretended with any reasonable degree of propriety.

In pursuance of this election the governor of the Territory of Kansas gave to the sitting delegate a certificate, bearing the seal of the Territory, certifying that John W. Whitfield "was duly elected a delegate to the second session of the thirty-fourth Congress of the United States from the Territory of Kansas at an election held on the first Monday in October, 1856."

Upon the foregoing state of facts the undersigned insist that the governor of the Territory not only had the authority, but that it was his bounden duty to the people of his Territory, and, indeed, to the entire country, to have issued his proclamation as he did for an election of a delegate from Kansas Territory to the present session of Congress. They maintain that his authority over the subject was not necessarily exhausted by the first election of a delegate to Congress; but only after the legislature, local to the said Territory, shall have passed a law prescribing "the times, places, and manner of holding elections" for delegates to Congress. That until they shall have done so, to carry out faithfully the spirit and meaning of the act organizing the Territory of Kansas, and to prevent a failure of representation in Congress from the Territory, it has been, from the *very* necessity of the case, and will continue to be, the duty of the governor of the said Territory to keep a delegate in Congress from the Territory of which he is governor, according to the true meaning and intent of the organic act.

The undersigned, in this regard, and surely in no spirit of disrespect, must be permitted to observe that they cannot regard the positions and arguments of the majority of the committee as eminently suited to this house in a question involving the right of a sovereign people to be represented on this floor by their chosen agent or delegate. For to construe the organic act as the majority of the committee insist on would be to say that the people of Kansas Territory could not, under any circumstances, have a delegate in Congress, should the territorial legislature, from inadvertence or otherwise, after the first election, fail to pass an act prescribing "the times, places, and manner of holding the elections." Surely those who voted for the organic act never thought of any such result. To adopt the construction of the undersigned would be to uphold the government of Kansas Territory; but to accept as sound that of the majority of the committee would be to disorganize and destroy the territorial government, which would lead to disastrous results. The House, it is to be hoped, will not do the latter.

The construction given to the organic act by the undersigned does not derogate from the rights of any; but, in its practical operations, secures to the people of the Territory of Kansas the great right of a delegate to represent them in Congress. But, for the sake of the argument, let it be admitted that the governor of the Territory of Kansas had no authority, either under the organic act or the laws enacted by the legislature of said Territory, to issue his proclamation for the election which was held on the first Monday of October, 1856, for a delegate to Congress from the said Territory, still the undersigned maintain that the action of the governor is fully justified by an act of Congress entitled "An act further to regulate the Territories of the United States, and their electing delegates to Congress," approved March 3, 1817. In the first section of this enactment it is provided as follows:

> That in every Territory of the United States in which a temporary government has been, or hereafter shall be, established, and which, by virtue of the ordinance of Congress of the thirteenth of July, one thousand seven hundred and eighty-seven, or of any subsequent act of Congress passed or to be passed, now hath, or hereafter shall have, the right to send a delegate to Congress, such delegate shall be elected every second year, for the same term of

two years for which members of the House of Representatives of the United States are elected; and in that house each of the said delegates shall have a seat, with a right of debating, but not voting.

Mark the words of the act: "*Now hath, or hereafter shall have, the right to send a delegate to Congress.*"

There having been "a temporary government established" in Kansas Territory, under the act of Congress of 1817, as just quoted from, the governor, in the opinion of the undersigned, not only had authority to issue his proclamation ordering the election, which was held on the said first Monday of October, 1856, for a delegate to Congress, but, being charged with the execution of all laws applicable to the said Territory, it was his indispensable duty to have done so.

The law just quoted, the undersigned maintain, has an important bearing, and is now, and has been from the time of the taking effect of the act of Congress organizing the said Territory, in full force therein. In support of this proposition they beg to refer to the thirty-second section of the said organic act, or so much thereof as bears upon the point in hand. The provision relied on in this regard is as follows:

That the Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of Kansas as elsewhere within the United States, except the 8th section of the act preparatory to the admission of Missouri, &c., &c.

In view of all this, the undersigned cannot allow themselves to doubt for a moment that the governor of the Territory of Kansas, in issuing his proclamation for an election of a delegate to Congress, to fill the vacancy occasioned by the expulsion of the sitting delegate from this house, during the last session of Congress, as before more particularly referred to, and that, consequently, the election held in said Territory in pursuance of the governor's proclamation, on the first Monday in October, 1856, was fully authorized, and but carrying out the organic act in its true spirit and import. And, indeed, in doing so, the governor was but executing faithfully the laws applicable to the Territory of Kansas in relation to the election of delegates to Congress, and evidently with the view of carrying out, in all good faith, to their legitimate ends, the great objects of the organization of that Territory. As the chief executive officer, the governor could not, in the opinion of the undersigned, have done less, without being guilty of an inexcusable dereliction of duty to the Territory of which he was governor, and, indeed, they think they may add, to the whole country.

When the vacancy was occasioned, in the manner before referred to, the undersigned do not believe that many, if any, members fancied even that they were voting to create a vacancy by the expulsion of Whitfield, which could not be filled without an amendment of the organic act or the election laws, enacted as heretofore stated, by the legislature of Kansas. But, doubtless, they believed that they were but referring the matter back to the people of the Territory, to be passed upon by them at the ballot-box, as they have done, and send a delegate here to fill the vacancy so created as aforesaid.

And, finally, in consideration of the premises, the undersigned are clearly of the opinion that John W. Whitfield is entitled to a seat in this house as the delegate from the said Territory of Kansas; and that, therefore, the resolution reported by the majority of the committee should not be adopted by the House.

All of which is respectfully submitted:

M. OLIVER.
W. R. SMITH.

The House (February 21, 1857) tabled the resolution reported by the committee—yeas 96, nays 85. This left Mr. Whitfield in the seat.

NOTE.—There was no debate upon this case in the House except upon the swearing in of he delegate, which will be found on page 2, vol. 34.

THIRTY-FIFTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. HARRIS, Illinois.
BOYCE, South Carolina.
WASHBURN, Maine.
STEVENSON, Kentucky.
CLARK, Connecticut.
Mr. PHILLIPS, Pennsylvania.
GILMER, North Carolina.
LAMAR, Mississippi.
WILSON, Indiana.

In the second session Messrs. Wright, of Tennessee, and Cavanaugh, of Minnesota, in place of Messrs. Phillips and Harris.

VALLANDIGHAM *vs.* CAMPBELL, *of Ohio.*

The preliminary contest was upon an application for further time (on the part of the sitting member) to take supplemental testimony.

Held by the committee that the fact that the sitting member was a member of the previous Congress and attended to his duties as such during a part of the time when by law the testimony should be taken furnishes no reason why further time should be granted.

Also, that the fact that the contestant occupied, or proposed to occupy, the entire sixty days after the answer of the sitting member to the notice of the contest served, does not entitle the sitting member to an extension of time.

On the second and main contest there is not, in the ordinary signification of the word, a report. The committee could not agree. One of the minority reports is signed by Messrs. Lamar, Phillips, Boyce, and Stevenson. Its concluding resolutions were adopted by the House, and its prominent legal points will be stated here:

It is not necessary in a notice to give the names of illegal voters objected to.

Abstracts of votes returned to the office of secretary of state, though not obtained within the sixty days fixed for taking testimony, can be used as documentary evidence.

Poll-lists are not sufficient evidence that a person voted; parol evidence of identity is necessary. A resort to parol proof, where the poll-lists are not required to be kept by law as records, is admissible.

Evidence consisting of the declarations of voters as to any matter concerning their own voting is admissible.

Persons having a visible admixture of African blood are not *white* within the meaning of the Constitution, and could not vote under the laws of Ohio.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 27, 1858.

Mr. T. L. HARRIS, from the Committee of Elections, made the following report:

That they have considered an application made by the sitting member to them to ask of the House, in his behalf, leave to allow further testimony to be taken, pursuant to the proviso contained in the 9th section of the act of February 19, 1851. This being an application amounting to a continuance of the case until a future day, it was deemed proper to settle it before deciding upon the merits of the case as presented in the issues and proofs of the parties.

Mr. Campbell, in support of his application, read and filed with the committee an argument, with several other papers connected therewith, which are submitted with this report. Mr. Vallandigham resisted the application, and read and filed with the committee an argument, with several other papers connected therewith, which are also submitted with this report. The reasons for allowing supplementary testimony to be taken in this case are so fully stated in the argument of the sitting member, and the objections to the same are so amply discussed by the contestant, that your committee deem it quite unnecessary to restate them.

The grounds upon which the sitting member seems to rest his application for leave to take supplemental testimony seem to reduce themselves to two, viz:

1. That the sitting member, having been a member of the last Congress during a part of the time, when by law the testimony should have been taken, and having been attending to his duties as such member, he should be exempted from the operation of the law so far as to allow him time for taking supplemental testimony.

2. That the contestant, by notices served upon the sitting member, occupied, or proposed to occupy, the entire sixty days after the answer of the sitting member to the notice of contest was served, and that he is therefore entitled to a period of time outside of the sixty days to complete his taking of testimony.

Upon the first point, your committee are clear that the fact of one of the parties being a member of Congress for the time being can in nowise affect his obligations to comply with the law. In all the relations of life, both private and public, circumstances are constantly occurring which are quite as imperative in their operation as those connected with a seat in Congress; and were this to be deemed a sufficient reason for a non-compliance with the law, it would at once take from its operation one-half the cases which arise. The fact that the law expressly provides for taking testimony by the parties or "their agents" excludes the construction that it was intended to apply only when the parties could attend in person.

Upon the second ground your committee are equally clear, that however extensive the time covered by one party in proposing to take testimony, it in nowise precludes the opposite party from proceeding at the same time to take it in his own behalf. There is no limitation to this power by the act of 1851, except "that neither party shall give notice of taking testimony *in different places* at the same time, or without allowing an interval of at least five days between the close of taking testimony at one place and its commencement at another." Under this provision, your committee believe full power is given to each one of the contesting parties to proceed with taking testimony, but limits each to one place at a time.

Your committee are of opinion that if either party to a case of contested election should desire further time, and Congress should not be then in session, he should give notice to the opposite party and proceed in taking testimony, and present the same and ask that it be received, and, upon good reason being shown, it doubtless would be allowed; but it seems too much to grant, in this case, for either of the reasons stated. It is now upwards of fifteen months since the election, and nearly one-half of the term of service has elapsed, and it is due to every interest concerned that the rights in dispute should be settled.

Your committee are therefore of opinion that no further time should be allowed to take supplemental testimony in the case. At the request, however, of the sitting member, that the question may be presented to the House, your committee report the following resolution:

Resolved, That it is inexpedient to allow further time to take testimony in this case, as asked for by the sitting member.

MINORITY REPORT.

The undersigned, members of the Committee of Elections, being a minority, and not agreeing with the majority in their report on the application of Lewis D. Campbell, the sitting member, for an order of the House to allow supplementary evidence to be taken on the memorial of Clement L. Vallandigham, contesting the seat of the said Lewis D. Campbell from the third congressional district in the State of Ohio, ask leave to submit the following report:

From the record in this case, (Mis. Doc. No. 4,) it appears that the contestant commenced taking testimony, at the city of Hamilton, Butler county, on the 2d day of February, 1857, and kept this commission open until the 13th day

of March of that year, (pp. 94 to 130.) It also appears that whilst the above commission was open and unclosed, the contestant (notwithstanding the express provisions of the act of Congress of February 19, 1851, in relation to contested elections, that neither party shall give notice of taking testimony at two different places at one and the same time) did give notice, and did proceed in pursuance of the same to take testimony, at the city of Dayton, on the 2d day of March, 1857, and continued the commission under the same open until the 18th day of March of that year.—(Mis. Doc., pp. 8 to 15.)

From this it is clear that contestant availed himself, and made the best possible and *double use*, of the time allowed by law for taking testimony in cases of contested elections. And it also further appears that contestant gave notice and commenced taking testimony, at the city of Dayton, on the 20th day of March, 1857, and closed the same on the 28th of the same month—the last day allowed by law for taking testimony.—(Mis. Doc. No. 4, pp. 22 to 90.)

It is therefore evident that the contestant actually consumed, and in fact employed, (if we count the time covered by open commissions at the different places,) the full period of *sixty-six days;* to which if we add the five days' interval required by law between the closing of the commission at one place and the opening at another or different place, it would make *seventy-one* days covered by the contestant by his commissions; whilst the sitting member, from the construction, in which, however, we do not concur, which it is clear to us both the parties gave to the law, was only able to take testimony from the 17th to the 27th March, 1857, and that, at the time the sitting member's notice to take his testimony as aforesaid was served, the contestant refused to attend, and claimed that *he* had already covered this time with *his* notices, and which latter statement is not denied by contestant.

And, in addition to all the above reasons, it is alleged and admitted that the sitting member, a short time after the time limited by law for taking testimony in such cases, proposed to contestant that each party should be at liberty to proceed and take such further and other testimony as either of said parties might desire, so as thereby to have a full, fair, and impartial investigation of the whole matter, but all of which was declined by the contestant.

Under such circumstances the sitting member had no other alternative but to wait until the matter came before Congress, and then avail himself of his legal and equitable right to take further evidence in the cause, which he did by his application to the House through the committee for leave to take testimony.

It is true, the contestant denies, upon the first notification from the chairman of the Committee of Elections of the pendency of his case, most of the statements in the application for the time; but as his denial only raises a question of veracity between himself and those who have given the sitting member the information of the facts set forth by affidavit in his application, the request for further time is clearly well founded.

The act of 1851 (Stat. at Large, p. 570) provides "that the House (not the committee) may, at their discretion, allow supplementary evidence to be taken after the expiration of said sixty days." The undersigned, therefore, for the reasons set forth in the application, recommend the adoption of the following resolution:

Resolved, That Lewis D. Campbell and Clement L. Vallandigham be, and they are hereby, allowed the further time of forty days from the passage of this order to take supplementary evidence touching the matters set forth in the memorial of Clement L. Vallandigham, contesting the right of Lewis D. Campbell as the representative from the third congressional district of Ohio in the 35th Congress of the United States.

Respectfully submitted:

JAS. WILSON.
EZRA CLARK, JR.
I. WASHBURN, JR.
JOHN A. GILMER.

The subjoined extracts will show the drift of the debate upon the preliminary question in this case:

Mr. STEVENSON. I do not think the gentleman from North Carolina who has just taken his seat has placed the issue upon the proper grounds between the majority, with which I concur, and the minority. Nobody on the Committee of Elections, as I understand, denies or questions the power of the House to extend the time for taking testimony under the election law of 1837. It is not a question of power, but it is a question which addresses itself to the discretion of the House, whether it will exercise a power which everybody admits is granted under that act.

Now, sir, the majority of the committee thought that Mr. Campbell, the sitting member, did not bring himself within the rule under which further time ought to be granted in which to take further proof in his case. I shall not detain the House long in stating the grounds on which the committee arrived at that conclusion. It will never do to place such a construction upon this act of 1851 as is now claimed by the gentleman from North Carolina, [Mr. Gilmer.] If such a construction is placed upon the act, then the act itself becomes a monstrous wrong. It gives safety to the sitting member, but it absolutely denies everything like justice to the contestant for a seat in this house. Why, sir, it is claimed here that the gentleman from Ohio, in consequence of his duties here in Congress, had no time to attend to the taking of that testimony which, by the act of 1851, is required to be taken within sixty days.

Gentlemen are well aware that in nearly all the free States the elections are held the year preceding the Congress in which the members elected are entitled to take their seats. This election took place nearly two years ago, just preceding the last session of the last Congress. Under the law of 1851 this testimony was to be taken in sixty days. Did the framers of this act contemplate the returned member to be present in person to take testimony, or could be present by an attorney? If present in person, he had to be there within the sixty days: and in this case that sixty days was necessarily during the second session of the thirty-fourth Congress. But, sir, the act clearly contemplated that if he was to be there in person he had the right to leave his seat in Congress for that purpose. He could either do that or he could be represented in the taking of testimony by an agent. Mr. Campbell was represented by an agent in taking proof; and yet now, eighteen months after, he comes here and asks that the time may be extended, in consequence of his having been engaged here at the time as a member of the House.

Will the law of 1851 bear such a construction as that? I put it to the legal acumen of the gentleman from North Carolina. Is it consistent with justice, or propriety, that such a construction should be placed upon it? Sir, under that construction, every gentleman who is returned from the free States will be engaged in Congress during the time when testimony must be taken under the law, if his seat is contested. He is presumed to be here; and if that will give him the right to have time allowed to take supplemental testimony, members from the free States, whose seats are contested, will always have that right.

Mr. WASHBURN, of Maine. * * * * Sir, I do not believe in the binding authority of the law of 1851 upon this house in all cases. I believe, sir, that it is directory, and not absolutely binding. I do not believe that the Senate of the United States, in conjunction with the House of Representatives in one Congress, can make a law which is to bind future Houses of Representatives. Not so. By the Constitution of the United States, each house is made the judge of the returns, qualifications, and elections of its own members, and each house can and must judge for itself upon those questions. The law of Congress of 1851 is nothing but the advice or suggestion of reasonable and intelligent and just men, as to the proper course to be taken—advice given when no particular case was before them, and which may be presumed to be good and sound advice and counsel in reference to the matter. It is nothing more. The law is not binding upon us; and if in any case it is oppressive, and there is reason for stepping outside of it, I hold that we have a right to do it. I hold that the law was intended to be a shield and not a sword. It was intended to say to gentlemen claiming seats here, that at a certain time and in a certain way they might take testimony, which should be received; but not to say that a member or his constituency should lose their rights upon this floor through any neglect, or inadvertence, or misinformation. No, sir; I will not consent to admit any gentleman claiming a seat upon this floor unless I believe that he has a right to it; that he has been elected; that he was the choice of a majority of the people voting in the district. I am willing to look beyond forms and technicalities, and to ascertain the sense of the people, and who has been rightfully and truly elected and will represent the people.

Mr. MARSHALL, of Kentucky. Mr. Speaker, in the determination of the question which is brought by the Committee of Elections before the House, propriety demands that we should lose sight entirely of everything like partisan feeling. It is a question of practice, and in treating it the House acts as a court as well as a parliamentary body.

The precedents under the act of 1851 stand in bold contrast with the course recommended by the committee. The resolution passed by the committee adopts a rule more stringent than it is usual to observe in courts of justice.

The application for further time to take testimony is met by the declaration that the sitting member in this case declined, directly after the election, to receive a notice from the contestant, the object of which was to go into an examination of the proof. What figure should this fact cut in the decision of the principle by this house?

The laws in Ohio require that the election shall be determined by a board of canvassers, consisting of the governor, secretary of state, attorney general, and probably some other public officer of the State. It provides that the county clerks in the several districts in the State shall forward the returns to the seat of government, and, upon the day fixed by the law of the State, the board of canvassers shall open the poll, examine the returns, and declare the result. The notice of the contestant was sent to the sitting member before the declaration of that result by the canvassers. The day fixed by law for canvassing the returns of the election was some day in December—the election took place in October—and the notice was served on Mr. Campbell in October, before the day fixed by the law of that State for the inspection of the election returns and the declaration of the result had arrived.

Mr. Campbell declined to enter upon the examination upon the grounds that *the movement was premature*. Gentlemen say that in this Mr. Campbell relied upon a technical objection. Not so. As the election was not to be declared until an appointed day in December, it would have been exceedingly indelicate for the member to have received notice of contest, and actually have proceeded to the defence of a seat which, by the laws of the State, had not been pronounced to be his. I ask the members of this high court whether any one of them, placed in exactly the same position, would feel himself at liberty to receive notice of a contest, and to go into an examination of the validity of his title to a seat, which title, by the laws of the land, had not been declared in his favor? Much less, then—if he would not do so—ought he to permit *this* refusal upon the part of Mr. Campbell to affect prejudicially the question which is now pending at the bar. I take it for granted that there is no judge in the world who sits upon the bench, disposed to do right, who would prejudice the rights of a party for *not* doing that, or for not accepting the proposition to do that which he was in no-wise bound by law to do, and was forbidden to do by every consideration of propriety. * *

Mr. WILSON. * * * * Now, sir, let us look at the law of 1851, and if the House does not wish to do injustice between these parties claiming the right to a seat upon this floor, let us see how they regarded this statute, and what construction they (the sitting member and the contestant) gave to it. I find in the application of the sitting member for additional time in which to take testimony, filed before the committee, the following language:

"I was detained in Washington several days after the adjournment by the sickness of one of my children, and by the subsequent demise of one of my former colleagues, the Hon. David T. Disney. At a meeting of the friends of the deceased from Ohio, then in this city, I was appointed chairman of a committee to accompany his remains to the residence of his family in Cincinnati; and in the discharge of this melancholy duty, I was unable to reach my home until the 19th of March, a few days prior to the expiration of the 'sixty days.' I then found that my attorney had taken steps to secure testimony in my behalf in one of the counties composing the district. He occupied ten days, (pp. 147 to 175.) I am informed by him that when he served notice (p. 138) contestant claimed that he had no right to do so, because *his* notices previously served covered the residue of the 'sixty days,' and refused to appear and cross-examine witnesses."

Now, sir, here is a material fact, as important, perhaps, as any one presented in the case. Yet never once does the contestant, in his reply, deny or even refer to this statement upon the part of the applicant for additional time to take testimony. If it is not true, why did he not deny it in his reply? This was the construction clearly given to the law not only by the contestant but by the sitting member.

Now, then, let us take one step further in this case. What is that? The time allowed by law closed, evidence had been taken upon one side and no evidence scarcely upon the other side. I understood the gentleman upon the other side of the House to say that eighteen months had elapsed, and that it was time this case was determined. Let us see what steps the sitting member took to determine this question between him and the contestant. Let us see who has been in "laches." On the 2d of April, 1857, at Hamilton, the sitting member forwarded to the contestant a letter, it being a part of the papers in this case, in which I find this language:

"Desirous that all the material facts shall be fairly presented before Congress, I deem it proper to advise you that I shall hereafter proceed to take testimony in the case, (of which due notice according to law will be given,) and to suggest my entire willingness to enter into a mutual agreement with you to waive any *technical* objection which might be made on the point of time in the taking of testimony on either side. I propose, therefore, a mutual agreement to that effect. This would give to both of us and to our friends a fair opportunity to present all the facts bearing upon the issue, and tend to prevent delay in the final decision of the matter."

Here was the offer made. The sixty days had elapsed. What did the sitting member say? I will go with you and take evidence notwithstanding; present that evidence before the House; that shall determine between us. What was the answer of the contestant? Here it is:

"Your intimation, therefore, that you mean to proceed with your testimony, in spite of the statute, gives me no concern. You can suit your pleasure and convenience in that respect. I beg to assure you that it will in nowise incommode or cause me expense."

He refused the offer, and declined to take the evidence. And why should the sitting member be held responsible now before the House on account of lapse of time, when the contestant himself refused to go outside of the law of 1851; contended that the law was imperative; had covered the whole time with his own commission; and declined to permit evidence to be taken after the "sixty days," so far as he was concerned.

Again, I state a fact which does not appear upon the face of the papers, but which I believe to be true. The law requires that so soon as the depositions are taken they shall be sealed and immediately forwarded to this house. These depositions were never forwarded until after the meeting of this Congress. They remained unsealed in Ohio until about the first week of Congress, when they were forwarded here; so I have been informed. Had not the sitting member, then, a right to consider that the party himself did not consider the testimony closed, and that time would be extended?

The House agreed with the majority of the committee that it was inexpedient to grant further time for the taking of testimony—ayes 114, nays 101.

The main contest in this case now follows:

MAY 13, 1858.

Mr. THOMAS L. HARRIS, from the Committee of Elections, submitted the following report:

That they have given the subject referred to them a most careful and laborious examination, have heard the arguments of the parties respectively and their counsel, and have sought to arrive at a just conclusion in the premises. But, from the points involved and the character of the testimony adduced, neither the committee nor a majority of their number have been able to agree upon any proposition for the action of the House. Four members of the committee are of opinion that the contestant is entitled to the seat. Four, likewise, are of opinion that the sitting member is legally elected and should be retained in the seat; and one member of the committee recommends that the seat be declared vacant, and the governor of Ohio be informed thereof. The committee ask that the views of their minorities, respectively, accompanying this report, may be received by the House.

Mr. L. Q. C. LAMAR, from the Committee of Elections, submitted the following views of a minority of the committee:

The election here contested was held on the 14th of October, 1856, and by ballot. The district is composed of the counties of Montgomery, Butler, and Preble. The whole number of votes cast at that election for representative in Congress was 18,657, of which the returned member, the candidate of the republican party, received 9,338, and the contestant, the candidate of the democratic party, 9,319, as the same were returned to the secretary of the State of Ohio, thus showing a majority for the former of 19 votes. The notice of contest, under which the testimony was taken, was served upon the returned member on the 29th of December, 1856, and the answer thereto on the 27th of January, 1857. The taking of testimony was commenced by the contestant on the 2d of February, 1857, and closed on the 28th of March following; and the taking of testimony by the sitting member was commenced on the 18th of March, 1857, and closed on the 27th of the same month. Upon the testimony thus taken, neither party offering any other evidence except the abstract hereafter referred to, the committee proceeded to hear and determine the case, the amplest opportunity for argument and investigation being allowed to both parties.

At the outset several objections of a technical character were presented by the returned member to the contestant's case, and the evidence by which it was

It was objected that the notice was not in compliance with the law, in that it did not specify with sufficient particularity the "grounds" of the contest, the main point relied on being that it did not set out the names of the illegal voters objected to. The undersigned believing that the law did not require any more to be set forth than the *class* to which the voters belonged, especially as by express provision it required each party to furnish ten days in advance the names of the "*witnesses*" proposed for examination, are of opinion that this objection is not valid. In the first case under the law, the Committee of Elections determined the same point in the same way. (Wright *vs.* Fuller, 1852, House Reports, 136.) In the last Congress the question presented in its strongest form by the answer of the returned delegate in the case of Otero *vs.* Gallegos, House Reports, 1855–'56, was distinctly decided by the committee against the objection, and the House indorsed the report. (House Reports, vol. 1, No. 90, page 2.) The undersigned find also that in cases arising in judicial courts, under similar statutes, the same objection has been overruled. In other respects, also, they are of opinion that the notice is quite as minute in its specifications as is requisite, or generally possible. It will be observed that the answer of the returned member is in the same form. They annex the notice and answer as Appendix No. 1.

It was objected that the committee ought not to receive and consider the "abstract" of votes returned to the office of the secretary of state, for the returned member and the contestant, because the document was not "obtained" or "taken" within the sixty days limited for "taking testimony." This objection, in the opinion of the undersigned, is destitute of force—without deciding whether it was not rather the duty of the sitting member than of the contestant to produce it before the committee—they are clearly of the opinion that the negative provision as to testimony, in the 9th section of the act of 1851, was intended to apply and does apply solely to the testimony of *witnesses*, or at most to such writing as can be proved *only* by the examination of witnesses; and that documentary evidence, at least that which proves itself, may be obtained at any time after the sixty days and produced before the committee at the hearin. Theg "abstract" in question purports to come from the proper office and officer, and bears upon it the impress of the great seal of the State, than which there can be no higher evidence of authenticity. In confirmation of this view, the undersigned find that in a majority of cases since the act of 1851 the abstract or copy of the returns has been "obtained or taken" subsequent to the sixty days limited in the act.

It was objected that the poll-books of the several wards and townships, or certified copies thereof, were not produced in evidence, and that until their absence was accounted for no proof could be received to establish the fact that the voter whose right is disputed did vote at the election. So much of the statutes of Ohio as relate to this subject will be found in Appendix No. II. It will be observed that as to the poll-books required to be sent to the clerk of the county court, no provision is made anywhere for furnishing copies for any purpose; and these poll-lists are not within the acts of Congress touching the authentication of records It nowhere appears that any part of the object of the law in requiring them to be kept is that they may furnish evidence in criminal prosecutions or upon contested elections, especially as they are not anywhere declared to be *records;* the chief purpose, no doubt, is to enable the judges of elections, and others afterwards, to compare the number of ballots in the box with the number of names on the poll-list, and thus to stand as a check upon frauds. The objection, then, founded upon their non-production must be decided by general principles and the precedents in Congress. The undersigned are of opinion that the poll-lists are not only not the sole and best evidence to prove that a particular person voted, but that they are not themselves sufficient. Parol evidence of identity is always necessary; that the name of the voter is on the list is only

corroborative evidence; it is only an item of evidence In Newland *vs.* Graham, 1836, the committee received evidence that persons voted whose names were not on the poll-books at all; and in the testimony here, to explain a discrepancy between the ballots and the poll-lists in one of the townships, evidence is offered by the returned member that two persons voted whose names are alleged not to have been upon the list. The undersigned are sustained in this view of the case by analogous decisions in courts of law, where it has been repeatedly adjudged that where even the law requires for purposes of evidence a register or list of the births, marriages, deaths, and the like, the fact in criminal cases may yet be proved by parol, (1 Greenleaf on Evidence, page 86, and cases there cited.) The undersigned find that the usage in Congress has not been uniform upon this subject; but they find, also, that the direct question was raised and passed upon in the great New Jersey case, in 1840, where the committee unanimously received parol evidence similar to that offered here. In the report of the majority of the committee it is said: "The first proposition involved the inquiry whether the vote was actually cast at the polls, and for the ascertainment of this point the committee necessarily resorted to parol proof as the best evidence the case would admit, the laws of New Jersey not requiring the poll-lists to be preserved as a *record* of the actual voters," (3 House Reports, 1839, 1840, No. 541, page 695.) A comparison of the provisions of these laws with the statutes of Ohio, the requirements of each as to the poll-lists being nearly identical, will conclusively establish that the decisions and precedents are precisely in point; the statutes of both States upon this subject will be found in Appendix No. II.

Objection was also taken to the admission in evidence of declarations or admissions by voters, here disputed as illegal, touching their qualifications and the candidate for whom they voted. Some of the declarations objected to, the undersigned are of opinion, were such as are received daily in courts of common law, relating to residence or being part of the *res gestæ;* others they believe to be competent, upon a reasonable application of the usual rules and principles of evidence by analogy and according to their spirit. Neither the committee nor the House is bound by these rules in their letter and strictness, but should proceed upon more liberal principles in the investigation of truth. They regard a contested election not as a mere private litigation, but a great public inquiry, where the real parties are not so much the returned member and the contestant as the voters of the district, and they are content to rest their opinion on this question upon the reasoning and upon the usages and solemn decisions of Parliament and Congress for years past, inasmuch as the distinction claimed to exist between an ordinary forensic court and a legislative assembly is recognized not only in Parliament and Congress, but by the courts themselves, and from a very early period. The admissibility of evidence consisting of the declarations of voters as to any matter concerning their own voting has been settled in the British Parliament repeatedly and uniformly for one hundred and fifty years, and is no longer to be questioned. These decisions are to be found in the numerous volumes of reported election cases and of treatises upon this subject. The rule has been recognized also in approved books of law: 3 McCord's Reports, 233, note; Phillips's Evidence, with Cow. and Hill's notes, 322. It is sometimes treated as an exception to the rule, excluding the hearsay declarations of third persons; but generally it is put upon the ground that in elections, contested because of illegal votes being received, *each voter challenged is a party to the proceeding,* and, therefore, whatever he says about his own voting is an admission or confession. In Congress, also, while the undersigned find several precedents distinctly adopting or recognizing the rule, they find none where it has been decided the other way, except in Newland *vs.* Graham, 1835–'36. Against this they refer to the following: *Contested Elections,* 80, 260, 272, 282, 258, 367, 750; the Broad Seal case, 1840, 3 House Reports, No. 541, pp. 699 and 749; Farley

vs. Runk, 1845–'46, and Monroe *vs.* Jackson, 1847–'48. In England, as in some of the States of this Union, the voting being *viva voce*, a class of declarations continually occurring in States where elections are by ballot are there, of course, almost unknown. We refer to declarations by voters as to how they voted. One case, however, accidentally occurred in Parliament where the poll-list did not show for whom the party had voted, and so his statement *as to how he intended to vote*, made to a third person, was allowed to be given in evidence: the Windsor case, 1807; P. and O. election cases, 173. No distinction has been set up in this country, nor do the undersigned perceive any; both are but hearsay, and the latter affects the party as much and in the same way as the former; and as the voter cannot be compelled to testify as to his qualifications, so neither can he as to how he voted.

The American cases have, indeed, been mainly directed to the question of receiving the declarations of voters. As to the latter, and beside several prior cases, the point was expressly and deliberately decided in the great New Jersey case, in 1840, usually known as the Broad Seal case; and the evidence was unanimously received, and a large number of votes determined upon it. This precedent has been generally approved ever since, and the undersigned attach more importance to it than usual, because it was unanimous in a highly partisan case, and because of the great ability and distinction of the gentlemen who composed the committee. The same rule of evidence as to declarations of voters, both as to qualification and vote, was deliberately adopted by the legislature of Maryland in 1819, as also in the legislatures of other States and courts having a special jurisdiction to try contested elections. As to a number of voters whose declarations are given in evidence, it appears upon the papers and testimony that their attendance as witnesses could not be procured; but it is not necessary in such cases to first call the voter and see if he will claim his privilege of refusing to answer. It was not done in any of the cases decided in the British Parliament. It is not necessary in settlement of cases where the declarations of the parishioner may be given in evidence, (1 Greenleaf on Evidence, § 175;) and the Supreme Court of the United States has expressly decided that where a witness cannot be compelled to answer he need not be called. (6 Peters's Reports, 352, 367.)

So much of the constitution and laws of Ohio as relate to the subject of elections, and are necessary to an understanding of these cases, will be found in Appendix No. III. By the rules and requirements therein laid down, or, where they are silent or in doubt, by the principles and the maxims of common law and common sense, or the usages and decisions of Congress and of judicial courts, applied in their spirit and by analogy, the undersigned have undertaken to test the several questions presented in this case.

The undersigned now proceed to dispose of the votes disputed or claimed by the parties respectively.

The contestant claims three additional votes because of ballots improperly rejected by the judges of election, and disputes the legality of seventy-three votes polled for the returned member. The latter claims seven additional votes because of ballots improperly rejected by the judges of election, and disputes the legality of nineteen votes polled for the contestant. The counsel for the returned member conceded in the argument before the committee that the two ballots rejected in Lemon township, Butler county, ought to be added to the contestant's poll; and the undersigned are clearly of opinion that the ballot rejected in the second ward, Dayton, ought to be added also. The intention of the voter to vote for the contestant seems plain upon a mere inspection of the original ticket. The returned member's counsel conceded, also, that the four ballots rejected in Washington township, Montgomery county, were properly rejected as double ballots. The undersigned think that the one ballot rejected in that township, because the sitting member's name was twice written on it,

ought to be added to his poll; but they refuse to add the two rejected in Harrison township, in the same county. The proof offered by the returned member, alone and without cross-examination, shows that when the ballots were first taken from the box the judge, when in the act of lifting them out, said: "Here is a double ticket," (testimony, 145, 148;) and that after full examination and discussion it was so adjudged at the time, and with the ballots before them. The apparent discrepancy between the number of ballots in the box and the names on the poll-list was accounted for at the time; and now, in the testimony, it appears to be satisfactorily explained. In the absence of the ballots, and upon the facts disclosed, they are unwilling to reverse the decision of the judges.

Minors.—Of minors the contestant disputes three votes and the sitting member four. The undersigned find all these votes to have been illegal, and voted as respectively claimed by the parties, and they deduct them accordingly.

Persons of unsound mind.—Of persons not of sound mind the contestant disputes three votes, and the returned member four. As to Robert Oliver, among the latter, the undersigned find no proof; and they are of opinion that the others are illegal upon both sides, and that they were cast respectively as claimed, and they deduct them accordingly.

Of aliens, the contestant disputes four votes, and the returned member three. The undersigned find three of the former to be illegal, and that they were cast for the sitting member, and two of the latter, and that they were polled for the contestant, and they deduct them all accordingly. They do not find the vote of John M. Rein to be illegal. Waiving the question whether the probate court in Ohio has authority to naturalize aliens, there is no legal or satisfactory proof before them that Rein had a naturalization paper issued by that court. The counsel for the returned member does not claim it as a bad vote.

Of non-residents of the ward or township two votes are disputed by the returned member, and none by the contestant. It is not denied that both these voters were legal electors of the county; but having voted, though not fraudulently, but by mistake, out of their proper wards, the undersigned find the votes illegal and deduct them from the poll of the contestant.

Of non-residents of the county the contestant disputes thirteen votes, and the returned member none. Of these the undersigned find six to have been illegal, and that they were polled for the sitting member, and they deduct them accordingly.

Of non-residents of the State the contestant disputes thirty-one votes and the returned member six. Of the latter the undersigned find four to be illegal, and that they were cast for the contestant, and they deduct them from his poll; of the former they find twenty-five to be illegal, and that they were polled for the returned member, and they deduct them accordingly. A table of the names of the voters deducted above, from each poll respectively, will be found annexed to this report.

Of votes cast by mulattoes and persons of color the contestant disputes sixteen, and the returned member none. The undersigned find that the sixteen persons named in the testimony and described as above (pages 105, 121, 125, 126, 127) did vote at the election, four of them in Hamilton, and twelve in Oxford township, Butler county; and that fifteen of them voted for the returned member; and that as to the remaining one there is no proof on either side as to how he voted. The undersigned are clearly of opinion that they are not legal voters under the constitution and laws of Ohio. That they are of the race or class of persons described in the sixteenth specification of the notice of contest is made clear by the testimony. Mr. Milliken, a judge of election in the second ward, Hamilton, describes the four who voted there (Testimony, 105) as "persons of color or mulattoes," and says there was in each "a visible admixture of African blood." "In regard to Anderson, I would think he had more white than black blood; in reference to the others, I would think it doubt-

ful whether the white or black blood predominated." Anderson admits himself to be of mixed blood, and says of two others that they had a visible admixture of negro blood; he thinks there is none visible in Mitchell, but admits "*that in his domestic relations he associates with colored people.*" But Mitchell is one of those testified to by Milliken as a person of color or a mulatto, it being doubtful whether he was nearer black or white. William J. Mollineaux describes the twelve who voted at the Oxford precinct (Testimony, 125) as mulattoes and persons of color, and three of them he particularizes as mulattoes. Joseph D. Ringwood says of the whole twelve, (Testimony, 126,) "they are all of mixed negro blood; according to my opinion, they are persons of a visible admixture of negro blood; they are so admitted generally in the community, and also by the judges of election. The matter was discussed before the judges, and the judges decided that these persons had a right to vote because they were more than half white."

Were these mulattoes and persons of color qualified electors in Ohio? The undersigned are clearly of opinion that they were not. The constitution of Ohio, adopted in 1851, requires, among other things, that the qualified voters shall be "white male citizens of the United States." They are clearly of opinion that men of the African race, of mixed negro blood, having a distinct and visible admixture of African blood, are not white within the meaning of the constitution, and they have no doubt that they are comprehended within the spirit and letter of the decision of the Supreme Court of the United States, in the case of Dred Scott *vs.* Sanford, 19 Howard, 393, and therefore not citizens of the United States. Any other doctrine would entitle them to seats upon the floor as members of this house.

That these mulattoes and persons of color, to the number of fifteen, voted for the returned member, the undersigned entertain no doubt. Anderson testifies to his own vote and as to the declaration of two others, his friends, one of whom worked with him; that there was an understanding between him and them that they were to vote, and they did vote for the sitting member. As to those who voted in Oxford, Lawrence, one of the twelve, declared to the witness that he voted for the returned member and advocated his election; and the proof as to the others, including Lawrence, though circumstantial, is just such as been repeatedly received and acted upon by committes and the House. That it is not positive and direct is because the nature of the case, the vote being by secret ballot, does not usually admit of such proof. In the great New Jersey case of 1840 testimony like the following, even as to persons of color, was *unanimously admitted* as both competent and satisfactory, and votes unanimously decided upon it. "I think Patterson was challenged by Van Doren. Van Doren is a whig. I recollect some democrats were in favor of his vote. I do not know how he voted. I do not know what ticket he had. I gave him a democratic ticket, but he did not tell me he would vote it. I do not know what his politics are, or what he professes to be. He said he voted the democratic ticket; he said also he had voted the whig ticket. McWilliams and Drake brought him in; Van Netta advocated his voting; in the dispute the whigs were the men who opposed and the Van Buren men were in his favor. McWilliams, Drake, Van Netta, are all strong Van Buren men." In another case, a colored person also, the sole proof consisted of the following: "Ezra Hill, who could neither read nor write, being sworn, saith, that he voted in the fall of 1858; he rather thinks it was a whig ticket; he got the ticket of Louis Tucker, and he believes he is a whig. The committee again unanimously deducted the vote from the whig candidate. In Monroe *vs.* Jackson, 1847–'48, there was no proof, as there was none in either of the above cases, of the *politics* of the voters, one hundred and sixty-three in number; but it was shown that they were brought to the polls by democrats; that the officers of the almshouse, of which they were inmates, were active democrats, and on the night

before the election carried a large number of democratic tickets with the name of the sitting member upon them, together with twenty-four other names, to the almshouse, and that they had charge of the omnibus in which these voters were taken to the polls; but it appears also that each of the inmates of the almshouse exercised his right to vote without restraint, that democrats and whigs were furnished with permits without distinction, and all who chose had an opportunity to ride in the omnibus; that a large number of the inmates refused to take democratic tickets at the almshouse, and some said they were going to vote the whig ticket; some said they had taken democratic tickets but voted whig tickets, and boasted of the deception, and that all did not vote the same ticket. Yet upon this evidence alone the committee reported against the sitting member and in favor of the contestant, and the House ejected the former from his seat. Upon the same kind of evidence alone the undersigned have deducted the votes of George Bush and Peter Spirk from the poll of the contestant; the proof in one case being that the voter received the ticket from a democrat, and that his father, who is the witness, *intended* that he should vote the democratic ticket. (Testimony, 150.) In the other case the voter was brought to the polls by democrats in a carriage bearing democratic flags and emblems. (Testimony, 171, 172.)

"What now are the facts and circumstances here before the committee as to these mulattoes and persons of color, and especially the twelve who voted at the Oxford precinct. William J. Mollineaux says as to the twelve, "that those persons known as democrats bitterly opposed their voting; the opposition (the republicans) favored their voting;" and being asked, "Did the friends of Lewis D. Campbell oppose or favor their election?" he said: "So far as I know, they favored it. * * * I opposed it myself in conversation, and heard others oppose it in conversation. Ringwood also testifies: "*I believe that they were all challenged, from the fact that we, the friends of Vallandigham, had made arrangements to have Dr. Garvin inside at the polls for the express purpose of challenging these identical men.*" Being asked to state "what part the friends of Campbell took with regard to these mulattoes voting," he answered: "*They took the usual part that men do to get up their friends to vote.*" So far as my knowledge extends—and I saw three or four go up to the polls—they were *attended to the polls by the friends of Lewis D. Campbell.* One of them, (Lawrence,) in conversation with me, admitted that he had voted for Lewis D. Campbell for Congress, and advocated his election. Cyrus Cowan told me yesterday that he had been forced to go to the polls to vote by John A. Gage, (John A. Gage is a very violent party man, and a friend of Campbell.) I saw Gage come to the polls with Cowan, and urging him to vote." (Testimony, 126.)

Along with this testimony, bearing thus directly upon this point, are several circumstances (disclosed in the evidence and papers of the case) which give color, weight, and directness to it. It appears (Testimony, 106, 127) that the right of these colored persons to vote was assumed, because they claimed to be *more than half white.*

Ringwood says, as to the Oxford voters, that the matter was discussed before the judges of election, and that they put their decision in favor of their right upon this ground. Two of these judges were understood to be political friends of the sitting member, and in his answer to the notice of contest the sitting member sets down as specification number "9" the following, of which he proposed to make proof, "that persons *half white and more*, entitled under the laws and decisions of the courts of Ohio to the right of suffrage, *who would have voted for me*, were refused the exercise of that right by the judges of election." (Testimony, p. 21.) Again, the first testimony relating to these colored voters was taken on the 3d of February, 1857, (fifty-five days,) and the last on the 7th of March, (three weeks,) prior to the expiration of the period limited by law for the taking of testimony, and it was taken in the city of

Hamilton, where the returned member resides, and where he appeared and was cross-examined by counsel. Had any fraud, surprise, or falsehood been practiced in regard to these voters, it would have been natural, as it doubtless would have been easy, to have exposed it; yet no attempt was made by him or his counsel to take rebutting testimony during that long period to prove either that they did not vote at all, or did not vote for him, or disprove the facts set forth in the testimony of the contestant. And further, instead of commencing with the testimony in Butler county, where the majority of these mulattoes and colored persons were alleged to have voted for him, he began and occupied the whole remaining time in Montgomery; and, moreover, in the application filed by him before the committee in January, 1858, ten months after the time for taking testimony expired, (House Report, No. 50,) while claiming and producing proof that one of the sixteen, James E. Robbins, whose vote the undersigned have not appropriated to either side, had declared that he had voted for the contestant, he yet made no assertion or claim, in his showing, that the other fifteen either had not voted at all, or had not voted for him.

From the testimony and these facts and circumstances in the case, and upon the precedents above cited, the undersigned, adopting the language of the committee in the case of Monroe *vs.* Jackson, a case not so strong as this, say that they do not hesitate to believe that these sixteen mulattoes and persons of color, (except, perhaps, Robbins,) above referred to, voted for the sitting member "they would have to shut their eyes to all the known rules by which individual conduct is judged to come to a different conclusion."

The undersigned annex, in Appendix No. IV, the testimony and journal of the committee in the New Jersey case, 1840; also extracts from the majority and minority reports of the New York case of 1847, 1848.

Upon a review and summary of the whole case the undersigned find the following result:

The whole number of votes cast for the contestant, as appears, was		9,319
To this add the three ballots rejected		3
		9,322
Deduct for illegal votes		15
		9,307
The whole number of votes cast for the returned member, as appears by the returns, was	9,338	
Add the one ballot rejected	1	
	9,339	
Deduct for illegal votes	55	
		9,284
Leaving a majority for the contestant of		23

The undersigned find that as to nine of the votes, which they have deducted as illegal from the poll of the sitting member, the sole proof *as to how* they were cast consists of their declarations or admissions proved by third persons; and that of these nine the proof of the disqualification of four of them is of the same kind only. One vote also deducted from the poll of the contestant is proved both as to vote and disqualification solely by the same kind of testimony. In all other cases the proof is either direct or circumstantial, or both, with or without declarations; and that as to declarations most of them were made at or about the time of voting, or the day of the election, or soon after.

Deducting now the nine votes established by the declarations of the voters challenged from the proper poll respectively, there still remains for the contestant a majority of 14 votes.

The undersigned submit, therefore, the following resolutions:

Resolved, That Lewis D. Campbell is not entitled to a seat in the 35th Congress as the representative from the 3d congressional district of Ohio.

Resolved, That Clement L. Vallandigham is entitled to a seat in the 35th Congress as representative from the 3d congressional district of Ohio.

L. Q. C. LAMAR.
HENRY M. PHILLIPS.
W. W. BOYCE.
J. W. STEVENSON.

MINORITY REPORT.

Mr. GILMER, from the Committee of Elections, submitted the following views of the minority:

The undersigned have no hesitation in saying that the whole case of the contestant fails on three substantive points, either one of which is fatal. The petition, admitting every fact alleged, does not show the petitioner to have been elected; for the only *fact* stated in it is in the sixteenth specification, that the ten persons named therein were allowed to vote for Mr. Campbell; and supposing that allegation sufficient in law, and *true*, it nowhere is alleged what Mr. Campbell's majority or aggregate vote for each was, nor that those votes, if deducted, would change the result. This allegation itself is sufficient only on the very questionable concession, that the words "mulattoes and persons of color" are descriptions of each and all of the persons named; for the rule of this house, as well as the general principles of law and the words of the statute, require that the "grounds on which" the party relies shall be *particularly* specified; and where the ground relied on is the admission or exclusion of voters, it can be "particularly specified" only by naming the *voter* and the *legal objection* to his admission or exclusion; and so this house held in Varnum's case, C. E. C. 112 and 113, and in Easton and Scott, C. E. C. 272.

There is further no "*particular specification*" of any fact by which the House can say that the contestant is elected over the sitting member; for if the ten votes be *bad*, yet it is not shown that Mr. Campbell's majority was only ten. No number is *specified*, and there is nothing on the face of the petition from which it can be inferred even. The general statement that the contestant "claims to have received a majority," is no averment that this house can regard; it states no fact but that he *claims* the majority. He might as well have said he claims the seat; a *majority* is a *number* and not a *claim*. It is ascertained only by comparing *numbers*; and if no *numbers* be given, there can be no majority stated.

It is supposed that nobody in the House will pay the least regard to the various specifications, that "*sundry* ballots," "*sundry* persons," "*sundry* qualified electors," &c., were accepted or rejected, or deterred, &c. They are not *specifications* at all. They state no *person* who *is* a voter; they contain no number; they give no notice to the opposite party; they cannot be proved by any evidence; for a witness swearing that "sundry" ballots were taken would be instantly stopped; and if he should go on to say A B or C D voted illegally, he would be proving what is not "particularly specified." What if one were to file a bill of particulars at law, "to sundries, $10,000?" There is, therefore, *no* specification which, if admitted, shows the contestant entitled to the seat.

This *alone* at once ends his case; for evidence is by the statute "confined to the proof or disproof of the *facts* alleged or denied;" and if there be no facts specified which, if admitted, show a title to the seat, proving the insufficient facts cannot better the case.

The proof fails as entirely as the allegations, so that were the latter sufficient, the contestant must fail because of failure to prove them.

A title to the *seat* can be maintained only by showing a majority for the contestant. That can only be done by proving the number of votes cast for the two parties and comparing them.

We have shown that the notice specifies no number of votes, nor even any number, as the alleged majority for the sitting member.

The proof is still more defective, if possible; for there is no proof *at all* which professes even to give either the aggregate vote for each party or the majority for the sitting member.

By law all evidence was closed in the case on the 28th day of March, 1857, for the notice of the contestant was given on the 29th day of December, 1856; the reply of Mr. Campbell, on the 27th day of January, 1857; and at the expiration of sixty days from the latter date the statute says *no testimony* shall be taken.

The House might, in their discretion, have allowed further testimony to be taken; but the House *refused* to allow it, and the committee proceeded, by resolution, to consider on the testimony filed regularly taken within the sixty days, except where the parties had otherwise agreed. If this be so, then a simple inspection of the printed document No. 4 is decisive, for it contains the *whole case* as it existed on the 15th of December, 1857, to which the House refused to allow anything to be added; and that evidence shows there is no statement of the aggregate vote for the contestant or the sitting member, or the majority of the latter.

But a piece of paper in the following words and figures was laid before the committee on the 6th day of January, 1858, which we respectfully decline to regard as any part of the evidence before the House, viz:

[Here follows an abstract of votes from the office of Secretary of State.]

The certificate was not taken and returned either in the time or manner prescribed by the law of 1851.

The certificate bears date the 21st day of December, 1856. The "sixty days" expired on the 28th day of March, 1857, and the law says "no testimony shall be taken after the expiration of the sixty days." The *date*, therefore, of the certificate excludes it, for it was not in existence till after the law said no more testimony should be taken.

But it is said this certificate is a paper of a public nature, and so not within the just meaning of the law, but it may be filed at any time.

It is certain that this view is necessary to justify the consideration of the paper, but it is probable that the *necessity* is the only foundation for the suggestion. It is certain the law countenances no such distinction between oral and written testimony, but, on the contrary, expressly provides for the very case.

The law of 1851 professes to provide "a mode of obtaining evidence in cases of contested elections;" it provides for the notice, for the specifying particularly the things to be proved, the officers who shall take the proof, the mode, and penalty for securing the attendance of witnesses, in the 1st, 2d, 3d, 4th, 5th, and 6th sections.

The 7th section provides for the actual examination of witnesses, and that *their* testimony shall be *immediately* transmitted by mail to the clerk.

The 8th section gives the magistrate power to require the production of papers, and, on the refusal of any person to *produce* and deliver up *any paper* in his possession pertaining to the election, or to produce and deliver up *certified* or *sworn* copies of the same, if they be official papers, is subjected to the

penalty of a recusant witness; and all papers *thus produced*, and all *certified or sworn copies of official papers*, shall be transmitted by said magistrate, *with the testimony of witnesses*, to the clerk.

Then this eighth section as expressly provides the mode of procuring written evidence, papers official or private, pertaining to the election, as the former sections do the taking of the testimony of witnesses alone; and in so doing it prescribes the mode of authenticating and returning the written papers.

If the mode of taking and returning oral testimony is binding, the mode of taking and returning written evidence, declared in the same law, must be equally binding.

If the evidence of a witness taken before an unauthorized person or after the expiration of the time limited cannot be read, a paper taken before the same unauthorized person or after the expiration of the time limited in the same act as to written papers cannot be read; and the eighth section provides both the mode and the time of taking and returning the written paper.

It first gives the magistrate power to compel the *production and delivery up of papers*. This includes *all* papers. The penalty imposed for refusal to produce or deliver up *papers*, or to produce and deliver up certified or sworn copies of the same, if they be official papers, shows that it extends to papers, *official* as well as *private*, and to *copies* as well as to the originals. Not only does it extend to official papers and copies sworn to, but also to copies of the same paper *certified;* and the *scope* of the section thus appearing to include official *papers copied and certified*, the only question open is, what it directs to be done with them.

May a contestant get an official paper, put it in his pocket, bring it to Congress, and then lay it before the committee or the House without any other formalities for authentication or identification? May he require us to take his word, or use our own eyes to divine the authenticity of the original produced, to know by intuition that it is not a forgery, or that the copy is accurate? or has the law been guilty of the folly of providing no opportunity for the opposite party to inspect the papers, to know what paper is to be used against him, to contest its validity, to show it a forgery, or the copy to be inaccurate, or to meet and rebut it by other evidence, oral or written? If so, the law is a provision for trickery and surprise—a bribe offered for forgery. These suppositions are all involved in the assumption that this certificate is properly part of the evidence we can now consider. Fortunately the law is quite explicit in defining how and where the papers shall be produced, and how, when, and where they must be sent to us here.

It says: "And all papers thus produced," *and all certified or sworn copies of official papers*, shall be transmitted by said magistrate, *with the testimony of witnesses*, to the clerk of the House. Well, this certificate is certainly a paper, and a certified copy of an official paper, and it was not even before any magistrate taking the evidence, nor transmitted to the clerk, *with the testimony* of witnesses, *at all*. It is, therefore, not here *at all* under the law. This is a *certified* copy, but the law provides for "certified or sworn copies" in the same breath. It therefore contemplates their taking the same course, being produced before the same person, identified by the same magistrate, and returned with the same testimony. But if so, then the certified copy must be produced before the magistrate taking testimony and by *him* transmitted to the clerk, for that is the only course a *sworn* copy *can* take, and the law says that both shall take the same course. It is the only course the *sworn* copy *can* take, because a *sworn* copy implies a witness who swears to the fact of having compared the paper produced with the original, to his knowledge of the original, and to the fact that the paper produced is a *copy*. This is what is meant by a sworn copy, a paper proved by *oral* testimony to be a copy of an original known and sworn to be genuine. It is oral testimony to the copy exactly, as proof of hand

writing is oral testimony to the original. But if this be so, then *this* is testimony of a witness to a fact, standing on the same footing with the testimony of the same witness to any other fact, and therefore only *valid* if taken before the authorized magistrate, within the authorized time, after the authorized notice, and transmitted in the authorized mode. This, therefore, is the course and the only allowable course for the production of a *certified* copy, since "certified or sworn" copies are embraced in the same provision. If this were not so, a sworn copy would be merely an *ex parte* affidavit taken without notice, gotten up after the case was closed and the *pinch felt*—kept secretly in the party's pocket till the day of hearing before the committee, and then *sprung* on the opposite party without any opportunity to test its genuineness, controvert its validity or accuracy, or rebut the presumptions it might create.

Are not all these consequences involved in this very case? Was this certificate ever communicated to Mr. Campbell when he could test or controvert it? Has he ever had an opportunity of showing that the number of votes it stated him to have received is too little? that the number ascribed to the contestant is too great? that he is elected by two hundred rather than by twenty votes? that the judges of election have miscounted in their summing up of the original poll-books, and thus have misled the Secretary of State? or any opportunity of contesting the truth of the certificate which now forms the ONLY proof of the most indispensable part of his contestant's case?

It is, therefore, clear that unless we repeal the statute this certificate cannot be looked at for any purpose, any more than if it had never been produced.

It is not evidence for another reason, were the former not adequate.

It is not a copy of any official paper which, of itself, when produced, would be evidence; but a mere copy of a certificate which *itself* is merely a *result* ascertained by calculation from the original and the only source of information—*the poll-books.*

The laws of Ohio require each voter to be registered on a poll-book, at the time of his voting, by the judges or commissioners of the election. This poll-book is directed to be returned from each place of voting to the clerk of the county, and from it the clerk is directed to certify to the governor the summary—that is, the number of votes cast for the respective candidates.—(See Swan's Dig. Stat. Ohio, pp. 342, 343, 344, sections 17, 18, 19.)

It is, therefore, plain that the only original record of the votes cast at any precinct or poll are not the clerk's certificate to the governor, but the poll-books kept by the commissioners, and by them sent to the clerk's office to be there safely kept for all persons "who may choose to inspect them."

It is from them the clerk gets all his information. They become the public records of his office, like the deeds certified to him by magistrates, of which *copies* are evidence, but a certificate of the contents or results whereof is not evidence except for any purpose which a special law may have declared it evidence. A certificate of the recordation of a deed from A. B. to C. D. to the tax commissioner, for the purpose of taxation, would be no paper a copy whereof would be admissible to prove the contents of the deed. To prove *that* the party must go, not to the tax commissioner's office, for a copy of the *certificate*, but to the clerk, for a copy of the deed. The *certificate* justifies the assessment of the land to *C. D.*, and the releasing of A. B., but is no evidence in an action against C. D. for the tax of the contents or existence of the deed itself, or that C. D. is owner of the land, and so liable to the tax. So the certificate of the clerk to the governor of the number—the summary of the votes—is an adequate foundation for the merely ministerial act of the governor in giving the certificate of election to the person appearing to have, from the clerk's certificate, the greatest number of votes. For that special ministerial act the clerk's certificate is a just foundation; the law makes it so, but it goes no further. It does not make it *evidence* in a legal *contest*, when the question is not how many votes are *certified*

to the governor, but how many votes were *actually cast at the polls*, that any vote *was really so cast*. The clerk cannot certify that *any* vote was cast, for he knows nothing about it. He can only certify that it appears by the record that so many votes were cast for A. B. and so many for C. D. But such a certificate is not a *transcript* of a record; it is a mere certificate of a *result* of *calculation* and estimate of the number which the clerk says he counted on the record which the commissioners sent him. What we need here is proof of how many voted for Mr. Vallandigham and how many for Mr. Campbell; this we can learn only by proving, by legal evidence, *each vote*, and adding them all up, and this can be done in no way but by the original poll-books or copies of the poll-books. They alone show that any one voted for either. A number is not a vote. Proof of a person's having voted can be given in no other mode than by producing the *record* of his vote, just as an appearance in court can be proved only by the recorded entry of the fact of appearance; and what is requisite to prove one vote is requisite to prove twenty thousand. The aggregate vote, therefore, can appear only from the poll-books; the majority can appear only from comparing the aggregate for each candidate. The aggregates, therefore, can be ascertained only by the production of the original, or certified or sworn copies of the poll-book; and the certificate from the secretary's office, being produced, is not either a poll-book or a copy of a poll-book, but merely a copy of a certificate of the summary made out by calculation of the clerks from these poll-books, professing to be *results* and not *contents* of the poll-books, and therefore no evidence of any fact contained in the poll-books.

If the law had required a copy of the poll-books to be certified to the governor, a copy of that copy certified to us by the governor or his secretary would not be evidence, still less can a copy of a certificate of a calculation made from the poll-books. It might be competent to show what the clerks certified to the governor, were the propriety of the governor's having given the certificate to one rather than the other here the question; but the question being, not whether the governor did rightly, but what votes did either candidate receive, the certificate is worthless, for it proves not what votes were given, *but what the clerk said were given*. The certificate is therefore no proof of the essential fact of the number of votes, without which the contestant cannot show himself to have received more than the sitting member.

But suppose all of these grounds are erroneous—grant, for sake of argument that the certificate is competent evidence to prove, not merely that there is such a certificate in the secretary's office, but also *evidence* that the voters enumerated in that certificate actually cast their votes as therein stated, then this admission, of course, goes on the supposition that *the* certificate in the secretary's office is *written official* evidence of the votes cast; and if so, then *this* excludes all the *parol* evidence of the contestant to show how particular persons voted. The certificate supposes the existence of the poll-books. Those poll-books are the original records of those who voted at the election; and being so, those poll-books are the written public evidence of who voted, and by the universal law no parol evidence can be received to prove the voting of any person. If the contestant wishes to prove that any vote given for Mr. Campbell is illegal, he can only do so by proving, first, the fact that the man *voted*, and this can be proved only by the poll-book, which is the written legal evidence preserved by law to show that fact; and this excludes *all* secondary evidence, even the oath of the voter himself that he voted for either party.

In a word, the mere fact of insisting that the *certificate* is legal evidence to show the aggregate vote admits the existence of written evidence of the persons who voted; and if so, then no proof is admissible that any particular person voted, but the poll-book, or a sworn or certified copy thereof, which is the record of the fact that he voted.

Nobody would for an instant allow a witness to swear that there was a certificate in the secretary's office showing that so many votes were cast for either party; but the production of the certificate would be insisted on, and it is equally absurd to allow a witness to come and swear that any one voted without producing the record of his voting.

Taking the case in the foregoing unanswerable points of view, we conceive the whole case ends in favor of the sitting member.

[The report concludes with the subjoined resolution. The summing up of votes cast is omitted.]

Resolved, That the Hon. Lewis D. Campbell is entitled to retain his seat as a member from the third congressional district in the State of Ohio to this Congress.

ISRAEL WASHBURN, JR.
EZRA CLARK, JR.
JAMES WILSON.
JOHN A. GILMER.

MAY 13, 1858.

The following extracts are taken from the debate in the House upon this case:

Mr. WILSON. * * * * * * The House had refused to allow the sitting member to return to Ohio, and take additional testimony. The committee, therefore, were to determine the case upon that already taken. At this meeting, to which I have referred, the following resolution was unanimously adopted. If I am wrong, I can be corrected:

"Whereas the House has declined to give the parties leave to take further testimony—

"*Resolved*, That the committee proceed to make up the result of the election on the testimony filed, regularly taken within the sixty days, except where the parties agreed that testimony otherwise taken may be read."

Here, then, all agree, the Committee of Elections agree, all political parties agree, that the case should be decided upon the evidence taken within sixty days, under the law of 1851, and that all other evidence should be excluded from consideration. This course was followed by the committee in the adoption of the resolution just read. The contestant had his evidence before the committee. The sitting member had his evidence only partially before the committee, and we were to make out our decisions upon that evidence as presented, and none other.

But, sir, when the committee came to make up that decision, there was not a single particle of evidence, and there is not now, in all the evidence, one witness who testifies as to any majority of the sitting member. There is no evidence on the part of the contestant showing what the vote was on either side. There is no evidence as to the majority of the sitting member. It is said that Campbell's majority was nineteen. Where is the evidence of the fact? There was none before the committee; there is none before this house; and I have just as much right to assume that the majority was nineteen hundred as the contestant or his friends have to assume that it was nineteen. Here is the evidence of perhaps one hundred witnesses, and not one has testified as to the vote given either for Mr. Campbell or Mr. Vallandigham in the third congressional district of Ohio. Not one witness testifies as to what the majority of the sitting member was, or whether he had a majority of thousands.

Early in the month of December last an abstract was brought into this house, and referred to the Committee of Elections, which purports to be an abstract of the votes returned in the third congressional district to the secretary of State of Ohio. It has been offered in evidence in this case. But is it evidence, either under the law of 1851 or the resolution of the committee? When was it filed? Was it filed within the sixty days? Is it a part of the testimony of Mr. Vallandigham? Is it a part of the testimony of Mr. Campbell? By no means—of neither; for how can this be considered as evidence proper in the case, when it was received and filed, as is the fact, more than one hundred days after the time required by the vote of this house and the resolution of the Committee of Elections under the law of 1851, and more than *nine* months after the election took place? I ask you, again, how that assumed abstract came here? Who brought it? By what right is it here to-day? By what authority was it filed with the clerk of the House? What legal officer sent it here? None whatever. No legal officer ever presented any abstract to this house of that character, or filed any such with the clerk. Who, then, ordered it to be sent to the Committee of Elections? Who has made that a paper which shall govern and determine this case? There is no legal mode by which such testimony, in such form, could have been brought before the Committee of Elections. I say the legal mode has not been adopted in this case.

Now, sir, twenty days after the assembling of Congress, and nine months after the election

had been held, this manufacture for evidence was presented, upon which we are called to determine which party is entitled to sit in this house as the representative from the third congressional district of the State of Ohio, notwithstanding the imperative rule, which was deliberately adopted, that all testimony produced after sixty days should be rejected. Now, if you are prepared to make this rule, as a Procrustean bed to be extended or contracted, let it so be understood, and then it will be known that laws and resolutions here made may be enforced or disregarded as shall best subserve party ends and party purposes.

* * * * * * * * * * *

I wish now to call the attention of the House to another point, and that is as to the notice and the grounds of the contest in this case. I wish to call the attention of the members of the opposite side of the House to the fact that, with the exception of two specifications, the whole notice of contest on the part of the contestant is vague, indefinite, and uncertain, and does not even require an answer on the part of the sitting member. In regard to that I am not confined to my own statement. I will bring testimony which should be recognized at least on the other side of the House. I refer to the case of Archer and Allen in the last Congress.

The contestant said in reference to that case that the minority did not seem to look at the authorities. That, at least, was not complimentary to the honorable gentleman from Illinois, [Mr Harris,] and the honorable gentleman from Georgia, [Mr. Stephens,] and those who were of that minority. Let us look at the notice. Here are nineteen specifications. I say that each and every one of them, except two, is vague, indefinite, and uncertain. I will read one or two of them:

"2. That, in counting out, sundry ballots were counted by the judges of election for you which should have been rejected.

"3. That sundry persons were permitted to vote for you in townships and wards of which they were not legal residents."

What persons? "Sundry" persons. Where do they live? Have they "a local habitation and a name"? Are they John Doe and Richard Roe? Who are these parties—these sundry persons? From what townships in the third congressional district of Ohio do they hail? Was it in Montgomery, Butler, or Preble that they voted? You will see that the law of 1851 provides as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, whenever any person shall intend to contest an election of any member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officer or board of canvassers authorized by law to determine the same, give notice, in writing, to the member whose seat he designs to contest, of his intention to contest the same, *and, in such notice, shall specify particularly, the grounds upon which he relies in the contest.*"

Now, sir, permit me, for one moment, to read the statement made by the minority of the committee, in the case of Archer and Allen referred to, which is directly in point. Mr. Harris, of Illinois, says:

"It is true that a notice that the sitting member's seat would be contested was served upon him within the time required by law; but it is equally true that the notice did not contain any of the specifications which the law requires. It is also true that the contestant, when he gave that notice, did not know how he was to contest it, or upon what particular grounds; or, if he did, he was guilty of disingenuousness in not specifying them, as the law, as every sense of fairness, required him to do. But, from the testimony, we are left without a doubt that when he gave the notice he did not know how, or upon what points, he was to make the contest. In his notice, therefore, he dealt only in generalities. He constructed a drag-net notice, by which he could include everything which chance or circumstances might reveal.'

Here is another drag-net, identical with that in the case of Archer and Allen. I have here, also, what was said by the honorable gentleman from Georgia, [Mr. Stephens,] and I would like to know from him, now and here, whether he will stand by his own report, made in that case of Archer and Allen, or not?

Mr. STANTON. Mr. Speaker, I do not propose to go into the discussion of this contested election at length; but I desire, on behalf of the State of Ohio, and as one of her representatives, to enter my *caveat* against what seems to have been recognized as a proper construction of her constitution, and the rights of voters under it. It seems to have been granted on all hands, that, under the authority of the Dred Scott decision, no person having any African blood in his veins is a voter under the constitution of Ohio. Now, sir, I do not admit any such construction of our constitution. I do not propose any discussion of the Dred Scott decision. Everybody knows that I do not subscribe to it. But I say, that consistently with that decision, persons having more than one-half white blood, and less than one-half African blood, are legal voters under the constitution and laws of Ohio.

Now, sir, for the purpose of the argument, I am willing to concede that any person having any African blood in his veins is held by the Supreme Court of the United States not to be a citizen of the United States so far as to entitle him to sue in the courts of the United States

or to entitle him to any of the rights of citizenship under the laws of the United States, because, under those laws, the federal authorities are supreme and sovereign. But, sir, I do hold that the courts and constituted authorities of the State of Ohio have a right, in the last resort, to put a construction on their own constitution, and on their own laws; and what ever is held by the Ohio courts to be a sound construction of an Ohio law, or an Ohio constitution, is its true construction everywhere, and wherever it may be called in question; and the United States Supreme Court is bound to follow it.

Mr. LAMAR. I did not expect to participate in this discussion. nor can I do so now with any justice to myself, laboring, as I am, under a severe indisposition. But, sir, the attack which has been made upon the report of that portion of the minority of the committee with whom I am acting upon this subject—an attack partaking more of ingenuity, I will say, with all due respect, than of fairness—leaves me no alternative but to come forward and defend the positions taken, and the general conclusion arrived at in that report.

Before I come to the consideration of the points which it presents, I desire, if I can, to fix the attention of members upon one point alluded to by the gentleman from Indiana, [Mr. Wilson;] a point which, though entirely unnoticed, and constituting no part of the contestant's case as made out in the report, is nevertheless, to my mind, absolutely conclusive as to the right of the sitting member. Reflection upon the subject, and an examination of the authorities, have convinced me that the election in the second ward of Dayton, excepted to by the contestant. and which resulted in a majority of ninety-two for the sitting member, was illegal and void. I hold that the entire returns of that ward ought to be rejected, upon the ground that the person who undertook to preside as judge over that election had no authority to act as such, being appointed, not in accordance with the law. but in direct violation of its provisions. By the law of Ohio regulating elections, the councilmen of each ward are constituted, *ex officio*, judges of the elections in their respective wards; and in the absence of either of those councilmen, or if either of them shall be a candidate at any election, the law provides that it shall be the duty of the electors of said ward, or the electors present, to choose a person to act as judge at said election.

* * * Congress has, in repeated instances, where the conduct of the returning officers was irregular, or the returns of the election informally made out, waived the irregularities and informalities, provided the *election itself* was fairly and legally conducted; but these precedents are all based upon the broad and obvious distinction existing between the returns of an election and the election itself. The election is the choosing of their representative *by the people*, in accordance with the law; whilst the returns are the mere evidence of the result, as *furnished by the officers*, consisting of certificates of boards and commissions. The election is the great *fact*, of which the returns are the mere legal *evidence*. Now, these returns may be informal; the acts of the officers may be irregular; Congress may set them aside, or waive them, without affecting the validity of the election itself. The fact of the election still exists, although Congress may ascertain its existence by evidence other than the returns.

But, sir, when you come to inquire into the election, it is quite different. The times, places, and modes of holding, and the *qualifications* of its officers, *as prescribed by law*, enter into the very essence of an election; are indispensable to its validity; and the fact of the election does not exist unless these are substantially carried out. And hence, whilst Congress has been very liberal in waiving the mistakes or neglect of returning officers—the officers duly appointed—it has ever been jealously rigid in enforcing the law in relation to the election. I will refer gentlemen to a case which occurred in the fourth Congress, of which many of the framers of the Constitution were members, and among them James Madison. In that case the very principle is laid down which I contend for; it is almost a parallel with the case under consideration. I refer to the case of Jackson *vs.* Wayne, (Contested Elections, page 47.) In that case it was held that "where the law required the election to be held by three *magistrates*, an election held by three persons, two of whom were not *magistrates*, should be set aside." In another case it was decided that "where the selectmen are returning officers, an election is conducted by persons who *are not duly elected selectmen*, the proceedings of the persons thus assuming to act will be void." There are many other cases directly in point, which I have not time to refer to.

The case quoted by the gentleman from Indiana to show that the acts of an officer *de facto* are valid as to third persons, is wholly inapplicable. It was a case of *quo warranto* in a court of common law; and the language of the judge demonstrates, more clearly than anything I can say, the utter inapplicability of the decision to the case of an ordinary contested election:

"The result of an election, *when controverted in court*, is like a judgment sued upon. *We have no* power to reverse it for errors in conducting it, and thus give those concerned in it a retrial."

Is this true of a contested election in Congress? Why, sir, nothing is more common than for this house to review the proceedings of those who conduct the elections, and to reverse their judgments. Analogies drawn there from the practice of common law courts of limited jurisdiction are hardly applicable to a body like ours, made by the Constitution judges of the election, returns, and qualifications of its own members. The words of the Constitution re broad and comprehensive, and embrace within their scope every subject and question

connected with membership. We are judges not of the returns and qualifications merely, but of the *election* of members. We can go behind the returns and inquire into the elections and into the qualifications of the officers, and set aside their acts if they be not duly qualified.

Mr. HARRIS. * * * Nearly all the cases referred to in the contested elections in England refer to the qualifications of the voters alone. The votes there are given *viva voce:* and the register lists and poll-books show the names and residences of the voters, and the names of those for whom the votes are cast; leaving the question of *qualification* as the only one that can ordinarily arise in contests for seats in the House of Commons. Those who are entitled to vote in the counties in England are "freeholders having land or tenements to the value of forty shillings a year above all charges, &c. Copyholders, or of any other tenure than freehold, whether of inheritance or for life, to the value of ten pounds, above rents and charges, &c. Lessees or assignees for a term originally created for sixty years or more, value ten pounds; for twenty years or more, value fifty pounds above rents and charges." &c. In the boroughs, including cities and towns, the qualifications are different: but in all, the possession of certain property interests are requisite; and in questions that have arisen in England as to the qualifications of voters, in most cases it has directly related to their existing interest in property. And proceeding upon the presumption that a man will not make a confession or declaration against his pecuniary interest, it is true that many cases are reported in the English books when the statements of the voter *against his interest* have been received to exclude his vote.

There are also decisions there against the admissibility of such statements, but the general current is in favor of their reception. But it will be clearly seen that the statement of a person against his possession, or right of possession, of a tangible, existing, valuable interest or estate, and by which his possession or right of possession may be lost, is a very different matter from the loose and often foolish talk of persons who may not be even aware of the import or consequences of what they say, or may mean the reverse of the construction placed upon their words by the hearer. Then the hearer himself may have lost, misapprehended, or forgotten some of the words used, and inferences may be drawn from them wholly erroneous. You once establish such a rule, and every illegal voter can, by making a false statement in the presence of a witness, make it appear that he voted directly the reverse of the fact; and while he in truth voted for A, you will deduct his vote from B. In this country, where almost every one has a voice at the polls, it is doing, in my judgment, violence to reason, to hold that admissions and declarations here, as to the qualifications of voters, more especially those made before and after voting, are to be placed upon the same footing as in England, where the admissions and declarations are against the pecuniary interest of the party making them, or where, relating to the question of bribery, they go to the effect of attaching to him who makes them the severest disgrace—a disqualification forever from voting and extreme penal consequences. There is no similarity or analogy in the condition of things that ought to make the decisions there authority here. Declarations or admissions made *at the polls*, when the act of voting is performed, may often, with the greatest propriety, be admitted as a part of the *res gestæ*. There is but one case which I have found in the English decisions where the statements of a party as to whom he had voted for were ever received in evidence, and that is the Windsor case; but that was received because neither party objected, and cannot be cited as a precedent. The cases cited in Ph. Ev. Con. and H., note 322, are taken from 3 McCord R., note 233, and they in turn from the English cases cited, which I have attempted to show have no analogy to our condition of things here. So much for these authorities and precedents.

On the 25th of May, 1858, the House, by a vote of yeas 107, nays 100, declared that the contestant, Mr. Vallandigham, was entitled to the seat.

NOTE.—The debate on the preliminary question will be found in vol. 36, part 1. In favor of report: Mr. Harris, page 559; Mr. Stevenson, page 560; Mr. Boyce, page 562; Mr. Phillips, page 564; Mr. Stephens, of Georgia, page 558. Against report: Mr. Gilmer, page 559; Mr. Washburne, page 561; Mr. Wilson, page 563; Mr. Marshall, page 585.

The debate upon the main contest is in vol. 36, part 3. For sitting member: Mr. Wilson, page 2321; Mr. Gilmer, page 2324; Mr. Bingham, page 2327; Mr. Billinghurst, page 2324. For contestant: Mr. Vallandigham, page 2317; Mr. Stevenson, page 2329; Mr. Lamar, page 2331; Mr. Harlan, page 2334. For vacating the seat: Mr. Harris, page 2336.

THIRTY-FIFTH CONGRESS, FIRST SESSION.

BROOKS *vs.* DAVIS, *of Maryland.*

Where the contestant memorialized the House to make a special investigation of his allegations, examining the witnesses at its bar, held that contestant must take his evidence under the act of 1851.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 12, 1858.

Mr. BOYCE, from the Committee of Elections, made the following report:

The question for the decision of the House will be developed by a brief statement:

The memorialist (Mr. Henry P. Brooks) and Henry Winter Davis were the only candidates for Congress in the fourth district of Maryland at the election which took place on the 4th day of November, A. D. 1857. By the returns of that election Mr. Davis appeared to be elected by a very large majority. The memorialist, however, gave notice, under the act of 1851, of intention to contest the right of Mr. Davis to his seat, on the ground that there was no real expression of the popular will, but that the election was carried by fraud, intimidation, and violence. In this stage of the case Mr. Brooks has memorialized the House to appoint a committee with adequate powers—to wit, in Washington or Baltimore—to investigate the facts connected with said election. The memorial of Mr. Brooks is in the following words:

To the House of Representatives of the United States:

Your memorialist respectfully represents to your honorable body that he and the honorable Henry Winter Davis were the only candidates for Congress in the fourth congressional district of Maryland at the election which took place on the fourth day of November, 1857.

By the returns of that election the said Davis appears to have been elected, and has taken his seat in this body; but your memorialist believes and charges that fraud and violence characterized and controlled the whole proceedings at the said election on the 4th day of November, 1857, so as to prevent the free exercise of the right of suffrage, and produce a different result from what would have been the case had a fair election been held; and he has therefore determined to bring the matter before your honorable body, in order that justice may be done.

To this end your memorialist gave the notice required by the act of Congress of 1851 in reference to contested elections. The said notice was given on the 26th of November, 1857, and has not yet been replied to. It contains, specifically, the charges which your memorialist makes against the character of the said election, and which he expects to prove. The said notice is appended hereto, marked A, and is prayed to be taken as part of this memorial.

Your memorialist, however, respectfully submits to this house and urges upon its attention some reasons why he ought not to be required to proceed under the said act of Congress.

He believes that the said act would prove insufficient and unsatisfactory in such a case as this, and he therefore respectfully asks that a committee with adequate powers, may either here or in Baltimore, investigate the affair in a full and ample manner.

The reasons suggesting the necessity for this course are as follows:

1st. That the disgraceful proceedings charged by your memorialist implicate the authorities of Baltimore as being either unwilling or unable to preserve the public peace; and it is upon those authorities that reliance is to be placed for inspiring the witnesses with that sense of personal security indispensable to the proper investigation of this case, for insuring their personal safety, and for preserving order during the examination.

2d. That but sixty days are allowed for evidence to be taken, with the right of the contestee to cross-question and examine the witnesses; and the extensive nature of the conspiracy charged would prevent as full investigation as should be had, unless conducted by a power competent to prevent delays, which could not be as effectually done by any judge or magistrate as by a committee of this house with extraordinary powers.

3d. Ten days' notice is required, under the act of Congress, to be given to the contestee of the names and residences of witnesses, and your memorialist believes that many persons whose testimony is important would be intimidated and prevented from appearing.

4th. The disposition and character of the witnesses, so readily ascertained from their manner by those present at an examination, will be totally lost in its effect if the evidence be in the nature of depositions.

Your memorialist, therefore, respectfully asks your honorable body, after being satisfied, by evidence summoned to the presence of the House, of the truth of the facts charged by the contestant against the character of the said election, or upon full investigation by a committee with adequate powers, to vacate the seat of the Hon. H. W. Davis, and order a new election to be held. And your memorialist will ever pray, &c., &c.

HENRY P. BROOKS.

The memorial is accompanied by the affidavits of a number of the most respectable citizens of Baltimore that the matters and things set forth in the memorial "are substantially true, to the best of their knowledge and belief."

The only question which seemed to the committee to be material to the decision of the application made in the memorial was, whether the evidence in the case could be taken without any extraordinary action by this house?

By the third section of the act of 1851 provision is made for the taking of testimony as follows:

And be it further enacted, That when any such contestant or returned member shall be desirous of obtaining testimony respecting such election, it shall be lawful for him to make application to any judge of any court of the United States, or to any chancellor, judge, or justice of a court of record of any State, or to any mayor, recorder, or intendant of any town or city in which said officer shall reside, within the congressional district in which such contested election was held, who shall thereupon issue his writ of subpœna, directed to all such witnesses as shall be named to him, requiring the attendance of such witnesses before him, at some time and place named in the subpœna, in order to be then and there examined respecting the said contested election.

The said act of 1851 further provides:

SEC. 5. That any person summoned in the manner hereinbefore directed, and refusing or neglecting to attend and testify, unless prevented by sickness or unavoidable necessity, shall forfeit and pay the sum of twenty dollars, to be recovered, with costs of suit, by the party at whose instance the subpœna was issued, and for his use, by an action of debt in any court of the United States; and shall also be liable to an indictment for a misdemeanor, and punished by fine and imprisonment.

These provisions of the law seem to be ample to secure the taking of testimony.

Now, can the memorialist take his testimony under these provisions of the law? for, certainly, if he can, he should be required to do so; for there is no use to have a general law upon the subject unless it is to be followed.

The memorialist urges several reasons why he cannot proceed under the act of 1851:

1st. That the authorities in Baltimore, being implicated in the alleged illegality of the election, cannot be relied upon to secure the safety of the witnesses. This is the opinion of the memorialist, but it is only an opinion. The contrary is asserted by the sitting member. Shall this house, upon a mere opinion of this kind, undertake the burden and expense of an investigation? Besides, if the House is to examine the witnesses at Baltimore by its committee, there will be no power there to protect the witnesses but the same Baltimore authorities, unless the House calls out a military force, which has not been suggested. If, on the other hand, the witnesses are brought to the city of Washington, the cost and delay will be very great. The committee would not have the House stop at any cost which might be necessary to attain the purpose. But if the purpose can be attained otherwise, then the cost should be avoided. But is the opinion well founded that the testimony cannot be taken in Baltimore in the usual way? One fact would seem to be conclusive upon this point, and that is, that Mr. Whyte, who is contesting the seat of Mr. Harris from the same city of Baltimore, is now actually taking his testimony there, under the act of 1851, in the most perfect state of quiet, as your committee have been informed and believe. Now, if Mr. Whyte can take his testimony in Baltimore, under the act of 1851, why cannot Mr. Brooks do the same? Your committee can see no reason for proceeding differently in Mr. Brooks's case from Mr. Whyte's case. They were both candidates at the same election, in the same city, and have contested the election on the same grounds. The fact that Mr. Whyte is now taking his testimony, undisturbed, in Baltimore, is a convincing argument to your committee that the opinion of the memorialist, that his testimony cannot be taken with safety to the witnesses, in the ordinary way, does not furnish sufficient ground for the House undertaking to secure the testimony by any extraor[illegible] proceedings.

The second ground upon which the memorialist relies is substantially that sixty days is too short a time in which to take the testimony. This would be a very good argument for the extension of the time, after the sixty days had been exhausted, but it is not considered of any force now.

The third ground upon which the memorialist relies resolves itself practically into the first, which your committee have already considered, and therefore they think it unnecessary to add any more upon it.

The fourth ground is inapplicable, for under no circumstances could the House examine the witnesses at its bar; and, in any mode of examination that is practicable, their knowledge of the testimony must be obtained from depositions.

Your committee have thus considered all the grounds relied on by the memorialist as inducements for the House to go beyond the act of 1851. The committee do not think they are sufficient to authorize such an unusual course. Let the memorialist go on under the act of 1851, and let the time for taking testimony be extended as long as may be necessary. If, after having made the effort, he is prevented from taking testimony by the lawless condition of affairs in Baltimore, or from any other cause, then the occasion will arise for this house to take the matter into its own hands, and proceed, by all the power it possesses, to vindicate the purity of the elective franchise.

Your committee, therefore, recommend that the prayer of the memorialist be not granted, and that he be left to make out his case, if he will do so, under the act of 1851. The committee recommend the adoption of the annexed resolution:

Resolved, That it is inexpedient to grant the prayer of the memorialist for the appointment of a committee to take testimony.

W. W. BOYCE.

The debate was brief in the House. The following extracts, with the report, give a clear idea of the "law" of the case:

Mr. PHILLIPS. The minority of this committee, Mr. Speaker, consider that there has been no law passed which provides for this case. This subject of contested elections has been frequently before the Congress of the nation, and on every occasion in which the question has been presented the constitutionality of the law on the subject has been denied. I have taken occasion to look into the matter, and I find, as early as the fifth Congress, there was an attempt to introduce a law similar to that passed in 1851, but it failed when the attempt was first made. Subsequently a law was passed in 1801, but it was limited in its existence, and was suffered to expire in 1805. Attempts were made to enact similar laws in 1806, in 1810, and in 1820, and on all these occasions the power of Congress to regulate the mode of taking proof in inquiries into the validity of elections was denied by a majority of the body. In 1851 this law was passed. The minority of the committee have presented their views upon this law as a salutary law. They consider that the existence of this law does not at all conflict with the Constitution; that it is a wise law; that it establishes wholesome regulations by which testimony may be taken in case of contested elections; but they most emphatically deny that there is any power in this law, or that there is power in any law the Congress of this nation can pass, to restrict either the House of Representatives or the Senate from inquiring into the election, qualifications, and returns of its own members. The Constitution prevents it. It says that "each house shall be the judge of the elections, returns, and qualifications of its own members."

Mr. HATCH * * * * * Again, I think, and a majority of the committee so agree, that this law of 1851 is not imperative; that it is not binding; and that is a sufficient answer to the position of the gentleman from Pennsylvania [Mr. Phillips] in regard to his constitutional objection. We do not consider the law of 1851 as imperative, but we do consider it a good, safe, and proper rule to be adopted by the House and by the committee in all contested election cases. But what now is asked? The gentleman from Pennsylvania [Mr. Phillips] say she wants a precedent set. Here is a popular remonstrance, he says; the party is not claiming a seat; he is not asking admission into this body, but the people are demanding an investigation, and he wants a precedent set that the people may have the right. And how? By a departure from the law of 1851; by a special commission. Do so, and what might be the result? Possibly a memorial might come here from the city of Philadelphia; might come from the city of New York; possibly from the city of Cincinnati, contesting the election of members of this house. Would the House upon any such memorial grant extraordinary commissions in all those cases for the purpose of taking

evidence by which to determine the legality of the election? Suppose that it should be charged that in the twentieth ward, or any other ward of Philadelphia, a large number of illegal votes had been cast—take, for instance, the gentleman's [Mr. Phillips] own district—would the House, therefore, grant an extraordinary commission, or would they say to the memorialists, "Bring the evidence forward, as in other cases; we will hear all you produce, and give you our decision?"

Mr. WASHBURN, of Maine. The question, it seems to me, for the House to decide is whether or not there is any power, under the law of 1851, to take the testimony necessary to make out the case of the contestant's memorial. I think there is. I think that the law of 1851, though I hold it to be merely directory, provides for taking testimony under it. I believe that any citizen of Baltimore, who is dissatisfied with the result of the election, could go to work, serve his notice, and take testimony under that law. It does not appear that that has been done. There is no evidence offered to the committee or to the House that the contestant in this case may not take testimony easily and readily. If this be so, why should we depart from the law? Why should we go outside of it and undertake to take testimony in an extraordinary and unusual manner? I have listened to the gentlemen who have spoken, and I have heard no reason assigned to satisfy me that there is any propriety in the House departing from the law. The sixty days within which testimony could be taken did not commence until the latter part of December. The contestant then might have proceeded to take this testimony, and if during its progress it should have appeared that he could not take it easily and readily, he might have applied to the House, and then, I have no doubt, the House would have provided for taking it.

The House agreed to the resolution reported by the committee by a vote of yeas 115, nays 89.

Subsequently the committee asked to be discharged from a further consideration of the subject, and their request was granted.

NOTE.—The debate is in volume 36, part 1. For the report: Mr. Boyce, page 725; Mr. Maynard, page 727; Mr. Wilson, page 732; Mr. Washburn, page 734. Against the report: Mr. Phillips, page 726; Mr. Hatch, page 728; Mr. Bowie, page 732.

THIRTY-FIFTH CONGRESS, FIRST SESSION.

PHELPS AND CAVANAUGH, *of Minnesota.*

Where the election of members to the House was prior to the admission of the State to the Union, held that the act of admission relates back to and legalizes every act of the territorial authorities exercised in pursuance of the original authority conferred.

The election of members by a general ticket instead of by districts is not a bar to admission to seats in the House.

The constitution of Minnesota provided for the election of *three* members, while the act of admission fixed the number at two. But *two* members were returned. Held by the committee that the rights of the two members elected were not invalidated.

IN THE HOUSE OF REPRESENTATIVES,

MAY 20, 1858.

Mr. THOMAS L. HARRIS, from the Committee of Elections, submitted the following report:

The certificate of W. W. Phelps, which forms the credentials presented, certifies "that at a general election, held on the 13th day of October, 1857, under the constitution adopted by the people of Minnesota, preparatory to their admission into the Union as a State, W. W. Phelps received a majority of the votes cast at the said election as a member of the United States House of Representatives of the thirty-fifth Congress from the State of Minnesota, and, by an official canvass of said votes, was, on the 17th day of December, 1857, declared duly elected one of its members." The certificate of Mr. Cavanaugh is in the same language. Both are dated on the 18th day of December, 1857, signed by S. Medary, then governor, and bear the broad seal of Minnesota.

The constitution of Minnesota, under which the State was admitted into the Union, provides in the schedule—

SEC. 21. The returns of said election for and against this constitution, and for all State officers and members of the House of Representatives of the United States, *shall be made and certificates issued in the manner now prescribed by law for returning votes given for delegate to Congress;* and the returns for all district officers, judicial, legislative, or otherwise, shall be made to the register of deeds of the senior county in each district in the manner prescribed by law, except as otherwise provided. The returns for all officers elected at large shall be canvassed by the governor of the Territory, assisted by Joseph R. Brown and Thomas J. Galbraith, at the time designated by law for canvassing the vote for delegate to Congress.

The 4th section of the "Act to establish the Territory of Minnesota" provides that a "delegate to the House of Representatives of the United States may be elected," &c., and "the person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly."

It will be seen, by these provisions, that the certificates of election referred to the committee are in due form certified according to law, and that there can be no question justly raised as to their regularity and force.

An objection is urged to the right of the claimants to their seats on the ground that their election was prior to the admission of the State into the Union. In the opinion of the committee, if it be admitted that there is no force in numerous precedents scattered through the journals of Congress, and extending back to the earliest times of the republic, sanctioning this course, it should be considered that Congress, by the enabling act authorizing the formation of a constitution and State government, thereby fully empowered the people of Minnesota to prepare themselves to assume, upon their admission, all the rights, powers, and attributes of a sovereign State in the Union. One of these rights is that of being represented in Congress; and were elections held prior to admission for members of the House of Representatives held void, States must remain unrepresented after their admission, and until elections can be subsequently held, presenting the anomalous spectacle of States *in the Union*, without representation or voice in the national councils. The act of admission into the Union, upon being consummated, relates back to and legalizes every act of the territorial authorities, exercised in pursuance of the original authority conferred. As the election of members to this house looks directly to the end in view contemplated by the enabling act of Congress, the committee think it entirely within the scope of action conferred upon the people of the Territory, and should be respected by Congress.

Another objection urged against the admission of the members who claim seats in the House of Representatives from Minnesota is, because of their election by general ticket instead of districts. The schedule of the Minnesota constitution provides—

SEC. 9. For the purposes of the first election, the State shall constitute one district, and shall elect three members to the House of Representatives of the United States.

The election was held throughout the State, as one district, in conformity with the foregoing provision.

This, it is contended, is in contravention of the 2d section of the act of June 25, 1842, and the election is therefore void. That section is as follows:

That in every case when a State is entitled to more than one representative, the number to which each State shall be entitled under this apportionment shall be elected by districts composed of contiguous territory, equal in number to the number of representatives to which said State may be entitled, no one district electing more than one representative.

It will be observed that, by the terms of this law, it was to apply only to "this apportionment," to wit, that of 1842; but should it be held otherwise, it is conceived that its effect has been already settled. The obligation of this act was brought in question by the next Congress after it was passed, in a contest

of the seats and the members returned from the States of New Hampshire, Georgia, Mississippi, and Missouri; and the Committee of Elections, to whom the subject was referred, reported a resolution as follows:

Resolved, That the section of "An act for the apportionment of representatives among several States according to the sixth census" approved June 25, 1842, is not a law made in pursuance of the Constitution of the United States, and valid, operative, and binding upon the States.

Upon the question of the admission of the members of the States named which had so elected their representatives by general ticket, and not in accordance with the law, it was decided in the affirmative by ayes 127, noes 57. This disposition of the question has never been disturbed, although members elected under the general ticket system have been upon this floor (with the exception, it is believed, of three Congresses) ever since, and without objection. It seems now too late to reopen the question.

There seems to be but one question of any importance remaining, and this grows out of the fact that the constitution of Minnesota provides for the election of *three* members to the House of Representatives, while, by the act for the admission of the State, it is entitled to but *two*. The right of Minnesota to hold an election prior to the admission of the State has already been considered, and its legality, upon the admission of the State, has been shown. Does the act of Congress cutting down the number proposed in the constitution of Minnesota from *three* to *two* render the election previously held altogether void? If *void*, then the gentlemen presenting credentials are not entitled to be sworn, and admitted to seats in the House of Representatives; if *voidable* only, the House will not, of its own motion, so declare it until some citizen of the State of Minnesota shall call it in question. It will not volunteer to search for causes to reject those who claim to be elected its members, and who bring credentials which are regular upon their face, and entitle them to admission.

The provision of the constitution of Minnesota for the *election* of members to the House of Representatives was approved by the act of admission, but the *number* was restricted to two. The committee have before them no evidence that more than two ever were elected, notwithstanding the provision of the constitution of the State. The committee have seen no other credentials than those referred to them, nor are they aware of any proclamation of the governor, or other canvassers, declaring any persons elected besides those now claiming seats. If, therefore, the question of *election* was presented to the committee, (which it is not,) there is nothing before them to justify the rejection of their claims. The committee are only instructed to "inquire into and report upon *the right of these gentlemen to be admitted and sworn* as members of this house." The committee construe this as a *direction* to inquire into the *prima facie* rights of Messrs. Phelps and Cavanaugh to be *admitted* and *sworn*. The credentials they present, in the opinion of the committee, clearly entitle them to their rights.

It was so settled in 1795, in the case of Benjamin Edwards, and has been uniformly sustained by the House, and since the celebrated New Jersey case, it would seem, cannot be properly questioned. These credentials, being regular upon their face, the number of those claiming seats is the number fixed by law to which the State is entitled.

No others are known to be claiming seats; no others are known to the committee to have been elected, or as claiming to have been elected. The committee are, therefore, of opinion that the gentlemen presenting their credentials are entitled *prima facie* to be sworn and admitted to seats; but they do not propose that such admission shall preclude any contest as to the rights of these gentlemen which may at any time hereafter be properly instituted. They submit the following resolution:

Resolved, That W. W. Phelps and James M. Cavanaugh, claiming seats as members of this house from the State of Minnesota, be admitted and sworn as such: *Provided*, That such admission and qualification shall not be considered as precluding any contest of their *right to seats* which may be hereafter instituted by any person having the right so to do.

The House agreed to the above resolution, (May 22, 1858)—ayes 135, nays 63. The debate occupied but an hour, and will be found upon pages 2312 and 2313, vol. 36, part 3.

THIRTY-FIFTH CONGRESS, FIRST SESSION.

FULLER *vs.* KINGSBURY, *of Minnesota Territory.*

The committee held that the admission of the *State* of Minnesota into the Union did not deprive the inhabitants of the Territory, not included within the limits of the State, of their right to send a delegate to Congress: the existence of the State of Minnesota did not destroy the existence of the Territory of Minnesota. The House rejected this conclusion of the committee—deciding that so much of the late Territory of Minnesota as lay without the limits of the State was without any legally organized government, and the people thereof were not entitled to a delegate in Congress till that right was conferred upon them by statute.

IN THE HOUSE OF REPRESENTATIVES,

MAY 29, 1858.

Mr. THOMAS L. HARRIS, from the Committee of Elections, submitted the following report:

The Committee of Elections, to whom were referred the resolution of the House of Representatives directing an inquiry into the right of W. W. Kingsbury to a seat in the House of Representatives as a delegate from that portion of the Territory of Minnesota not included within the limits of the State of Minnesota; and the memorial of Alpheus G. Fuller, requesting to be admitted to a seat in the House of Representatives as a delegate from the Territory of Dakota; and a certificate from certain officers of Midway county, in the Territory of Dakota, of the election of said Fuller as such delegate, respectfully report:

That by the act of Congress approved March 3, 1849, entitled "An act to establish the territorial government of Minnesota," the boundaries of said Territory were defined and fixed as follows:

"Beginning in the Mississippi river, at the point where the line of forty-three degrees and thirty minutes of north latitude crosses the same; thence running due west on said line, whi h is the northern boundary of the State of Iowa, to the northwest corner of the said State of Iowa; thence southerly along the western boundary of said State to the point where said boundary strikes the Missouri river; thence up the middle of the main channel of the Missouri river to the mouth of the White Earth river; thence up the middle of the main channel of the White Earth river to the boundary line between the possessions of the United States and Great Britain; thence east and south of east along the boundary line between the possessions of the United States and Great Britain to Lake Superior; thence in a straight line to the northernmost point of the State of Wisconsin, in Lake Superior; thence along the western boundary line of said State of Wisconsin to the Mississippi river; thence down the main channel of said river to the place of beginning."

The fourteenth section of said act provides "That a delegate to the House of Representatives of the United States, to serve for the term of two years, may be elected by the voters qualified to elect members of the legislative assembly, who shall be entitled to the same rights and privileges as are exercised and enjoyed by the delegates from the several other Territories of the United States to the said House of Representatives."

Under this provision the Territory of Minnesota has been, without interruption, recognized in the House of Representatives by a delegate, elected in conformity with law. It further appears that William W. Kingsbury was regularly elected on the 13th day of October, 1857, as such delegate, and, in that capacity, was, at the opening of the present session of Congress, admitted to, and has held, a seat in the House of Representatives until the passage of the act of May, 1858, for the admission of the State of Minnesota into the Union, when his right to retain it was brought in question. Of the legality of the election of Mr. Kingsbury as the delegate from the Territory of Minnesota there seems to be no doubt. A copy of his credentials, signed by Governor Medary and attested by the seal of the Territory, is appended to this report. The number of inhabitants in the Territory not included in the bounds of the State is not very clearly settled, but, as far as can be learned, it amounts to several thousands, and is said to be rapidly increasing. There were five counties established by law, and two of them fully organized, with the proper officers for regular municipal government.

By the act of Congress approved February 26, 1857, "to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission into the Union on an equal footing with the original States," the boundaries of the State were limited upon the west by the line of the Red River of the North, the Bois des Sioux, the centre of Lake Traverse, a direct line from the southern extremity of Lake Traverse to the head of Big Stone lake, the centre of Big Stone lake to its outlet; thence, by a due south line, to the State of Iowa. The inhabitants of all that portion of the original Territory of Minnesota east of this line were by this act "authorized to form for themselves a constitution and State government by the name of the State of Minnesota, and to come into the Union on an equal footing with the original States, according to the federal Constitution;" and the question is presented, Does the admission into the Union of a State formed out of a part of the original Territory of Minnesota annul the election of the delegate, repeal or set aside the law creating the Territory, and all other laws; deprive the people inhabiting that part of the Territory not included in the limits of the new State of the right or privilege of being heard in the House of Representatives by an agent or delegate; substitute anarchy for a government of law, and resolve society into its original elements? Such is not the opinion of your committee. There is nothing in the act authorizing the people of Minnesota to form a constitution and State government, nor in the act for the admission of the State of Minnesota into the Union, which repeals in anywise the law creating the Territory, or deprives the people inhabiting that part not included in the new State of any rights or privileges to which they were entitled under any laws existing at the time of the admission of that State. It matters not whether one State or half a dozen have been carved out of an organized Territory; if a portion remains, and, more especially, if inhabited, and counties and towns, with their corporate governments, exist, created by law, it would seem to be a most violent presumption to hold that they became *eo instante* upon the admission of the State a disfranchised people—a mere mob or rabble. The fact that the admitted State bears the same name as the Territory may lead to some confusion of ideas, but it does not alter the fact. The existence of the *State* of Minnesota does not destroy the existence of the *Territory* of Minnesota, nor deprive the inhabitants of such Territory of any of their rights. No such result can be by implication. The territorial law must be repealed before such consequences could follow, and even then a grave question would arise here how far such repeal could operate upon the rights of the people.

These views and conclusions are not without precedent. By the act of Congress of May 1, 1802, the State of Ohio was authorized to form a constitution and enter the Union. On the 6th of December following, Mr. Paul Fearing,

who had been elected before the passage of the act of May 1, 1802, a delegate to Congress from the Territory of the United States Northwest of the River Ohio, took his seat in the House of Representatives. On the 24th day of January, 1803, a resolution was introduced declaring that, inasmuch as Paul Fearing had been elected by the late territorial government of the Territory Northwest of the River Ohio, he was no longer entitled to a seat in the House. This resolution was referred to the Committee of Elections, and they reported in favor of his retaining his seat, and he was retained by the House. This case seems directly in point.

The case of Henry H. Sibley, in 1848–'49, a delegate from the Territory of Wisconsin, is similar in character to that under consideration. He was elected as a delegate from the *Territory* of Wisconsin after the *State* of Wisconsin had been admitted into the Union. He was elected from that portion of the original Territory of Wisconsin not included within the boundaries of the State. The question as to his right to a seat was raised and referred to the Committee of Elections, who reported in his favor, and the House, by a vote of 124 to 62, gave him his seat. These precedents, based, as they are, upon the soundest reason, seem conclusive of the case, and establish the right of Mr. Kingsbury to his seat as the delegate in this house from the Territory of Minnesota.

Having arrived at this conclusion, it seems to dispose of the question involved in the memorial of Mr. A. G. Fuller and his certificate of election under the hands of the county officers of Midway county, in the Territory of Dakota. There is no Territory of Dakota, known to your committee, which is authorized to elect a delegate to the House of Representatives. It is also conceded by Mr. Fuller that this so-called "Territory of Dakota" is the same geographical area as that portion of the Territory of Minnesota not included within the limits of the State of Minnesota. In other words, the so-called "Territory of Dakota" is the Territory of Minnesota, the delegate from which Territory is already recognized in the person of William W. Kingsbury. The committee are informed, on what they consider good authority, that on the 13th of October last, at the election for delegate to Congress, the people of this so-called Territory of Dakota, or a part of them, did vote fo Mr. Kingsbury for their delegate, and they so claim him to be, notwithstanding the admission of the State of Minnesota into the Union. The committee append to this report a copy of Mr. Fuller's certificate and memorial, but they discern nothing in them to authorize or render expedient his admission to a seat in this house.

The committee submit to the House, for adoption, the following resolutions:

Resolved, That William W. Kingsbury be allowed to retain his seat in the House of Representatives as a delegate from the Territory of Minnesota.

Resolved, That the Committee of Elections be discharged from the further consideration of the memorial of Alpheus G. Fuller, asking to be admitted to a seat in the House of Representatives from the Territory of Dakota.

Mr. GILMER, from the Committee of Elections, submitted the following views of a minority of the committee:

In the case of W. W. Kingsbury, who claims to represent that portion of Minnesota not included in the State of Minnesota by virtue of an election held on the 13th of October, 1857, the undersigned, a part of the Committee of Elections, find and report the facts to be as follows:

The territorial act included a larger space. The enabling act divided the Territory into two parts: that which now composes the new State, and the balance that which Mr. Kingsbury now claims to represent as a delegate. Mr. Kingsbury was elected by the people resident in the limits of the State, and by no others; those resident in the balance of the Territory, outside the proposed State limits, not being allowed by law to vote in his election.

On the said 13th day of October, 1857, the people resident in the limits of the State voted entirely to themselves. They elected a delegate, (Mr. Kingsbury,) who had opposition; also elected representatives. On the same day, the inhabitants outside said State limits held a separate election for themselves and elected A. G. Fuller their delegate, said Fuller also having an opponent. The people outside the State limits acted and voted separately and independently; so did the inhabitants within the State.

Section 14 of the act organizing the Territory of Minnesota, approved March 3, 1849, provides that a delegate to the House of Representatives of the United States may be elected by the voters qualified to elect members of the legislative assembly. The election for governor, State officers, members of assembly, and representatives, as well as delegates, was confined to the voters within the limits of the proposed State. No polls were opened for these elections to the people outside the limits of the proposed State.

We further find and report that the said W. W. Kingsbury is not a resident of the Territory which he now claims to represent, but resides within the limits of the State, whose inhabitants alone elected him, and that he received no votes from the people of the Territory without the State limits.

We further find and report that the people residing out of the limits of the proposed State, after being separated, in anticipation of a separate territorial organization for the remaining Territory, under the new name of Dakota, held an election for a delegate on the 13th of October, A. D. 1857, as stated in the memorial of A. G. Fuller, when the said A. G. Fuller received a large majority of the legal voters resident in the said Territory, and he holds the best evidence thereof which the present imperfect legal provisions in the Territory will admit of; and, according to the precedent in the case of H. H. Sibley, from Wisconsin, would be entitled to his seat as a delegate representing the resident citizens on the remaining Territory, who voted for him, and who were not by law allowed to vote for or against W. W. Kingsbury.

We present for the approval of the House the following resolutions:

Resolved, That W. W. Kingsbury is not entitled longer to retain a seat in this house as a delegate from the Territory of Minnesota.

Resolved, That A. G. Fuller be allowed to qualify and take a seat in this house as a delegate from the said Territory without the limits of the State of Minnesota.

JAMES WILSON.
EZRA CLARK, Jr.
JOHN A. GILMER.

MAY 31, 1858.

The subjoined debate occurred in the House before the vote was taken:

Mr. HARRIS, of Illinois. * * * * At the time the delegate from Minnesota came here there was no State of Minnesota, and a residence in any part of the Territory was sufficient. The admission of a State formed out of a part of what then constituted the Territory of Minnesota, leaves it, in my opinion, a matter of election of the parties to recognize their residence in whatsoever part they please. Such has been the precedent heretofore in similar cases. I think the precedent is a correct one. It does not matter whether the parties lived inside of what is now the Territory of Minnesota, or in what was the Territory of Minnesota when they were elected. They were elected by the people of the whole Territory: they have the right to represent the people of the whole Territory, and the right to represent the people of each part of the Territory; and so long as a part of the Territory exists in its territorial condition, under the act organizing that Territory, it is entitled to be heard in this house by a delegate here. There is nothing in the law creating the Territory, or in any law that I have seen, which requires that a delegate should be a resident of the Territory from which he comes. The law simply provides that the Territory shall be entitled to have a delegate in Congress. Such an opinion may have existed by analogy supposed to exist between the requirements in respect to a Territory and those of a State. But, sir, there is no reason for such analogy, and such a requirement has never been made by any law of Congress. It would not be competent, in my opinion, for the House to undertake to put such a construction upon the law.

Mr. LETCHER. I know nothing about the facts in the case; but I desire to know whether an election was ever held in the Territory outside of the State limits for a delegate to Congress?

Mr. HARRIS, of Illinois. I will reply to the gentleman that an election was held on the 13th of October last, a day fixed by law for the election of a delegate to this house from the whole Territory.

Mr. LETCHER. That was under the Territory of Minnesota, as it then existed.

Mr. HARRIS, of Illinois. Under the territorial law of Minnesota.

Mr. LETCHER. And, under that law, the people outside held that election for member of Congress.

Mr. HARRIS, of Illinois. The people outside voted for a delegate to Congress; and they voted outside, as well as inside, the State limits.

Mr. LETCHER. What was the state of the vote as between the two?

Mr. HARRIS, of Illinois. It is not given in its aggregate. The certificate of the secretary of the Territory, which was read yesterday, shows that the vote was two hundred for Mr. Kingsbury: and there is a written statement of another officer of the Territory, who resided on the Missouri river, outside of the State limits, showing that Mr. Kingsbury received the entire vote of the precinct where he voted.

Mr. LETCHER. Was that in Dakota or Minnesota?

Mr. HARRIS, of Illinois. It was in Minnesota. We do not know such a Territory as the Territory of Dakota. It was outside the State limits of Minnesota, and in what is called Dakota.

Mr. WASHBURNE, of Illinois. Did not the other party receive votes outside of the Territory; and a larger number than Mr. Kingsbury?

Mr. HARRIS, of Illinois. It is stated that Mr. Fuller did receive votes outside of the Territory. The number of votes he received I do not know; nor can it be said by any one upon this floor, so far as I know, that Mr. Fuller received more than Mr. Kingsbury, or Mr. Kingsbury more than Mr. Fuller. The votes which were cast for Mr. Kingsbury were cast in conformity with law, before the proper officers authorized to receive them and to make the returns. They did make the returns to the proper officer. They were canvassed by the governor, the secretary of the Territory, and the officers appointed to canvass the votes. The returns were made, and Mr. Kingsbury was declared the delegate from the Territory. He came here under the operation of that law and the result of the election, and occupied a seat without question until the admission of the State. It is entirely unnecessary to inquire into the number of votes Mr. Fuller received, because he received no votes cast in conformity with any existing law. There is no certificate from the functionary authorized to send certificates of election to this house that he ever received a vote. A paper was read here yesterday purporting to be from the president of the board of county commissioners of Midway county, Dakota Territory, stating that Mr. Fuller had received a certain number of votes. It was verified by a seal of Dakota Territory, or a picture representing it. There is no such Territory as Dakota Territory; and the very fact that these officers, who assume to be returning officers, attached to their seal a territorial designation, which does not exist by law, unknown to law, is a piece of presumption and a piece of impertinence which ought not to be recognized for a moment. There is no such Territory as Dakota; and it is time enough to receive certificates from officers of the Territory of Dakota when such Territory is organized.

[Mr. WILSON made a remark here which was not heard at the reporter's desk.]

Mr. HARRIS, of Illinois. Whatever officers there are outside of the present State of Minnesota hold their offices by the appointment of Governor Medary, as the governor of the Territory; all the justices of the peace, all the executive officers, except, perhaps, in this county of Midway, where there may have been an election for officers. I do not know how that is; it is a matter of no sort of consequence. They seem there to have gotten up, for their own uses and purposes, a Territory which they call the Territory of Dakota, and they want us to recognize it, when, in fact, the law recognizes the Territory of Minnesota, extending over and operating upon that very Territory. I prefer to follow the directions which the law gives, and to recognize the delegate who came here through the forms of law to taking any delegate who comes here with such papers as are presented by Mr. Fuller.

Mr. WASHBURN, of Maine. It seems to me that this question lies in a nutshell. We are simply to inquire whether there is now existing the Territory of Minnesota. If the Territory of Minnesota is not in existence, if it was absorbed or destroyed by the admission of the State of Minnesota, then there is no delegate here; but if there is such a Territory now in existence, then there is a delegate from that Territory, and it is the delegate who was originally elected. If the Territory was destroyed, then there is no territorial organization; and upon the precedents in the case of Carr, who came from Mew Mexico in 1848; in the case of Babbet, who came from Utah in 1848; and in the case of the delegate who came from Kansas before it was organized, there is no delegate here.

Mr. HARRIS, of Illinois. My friend from Maine says that this matter is in a nutshell. It is a very large nut, according to his statement. The gentleman has presented the case strongly. I presented the case in that way yesterday, and it was only in view of the point that because Mr. Fuller received a certain number of votes of the people residing there, he

ought to be received rather than Mr. Kingsbury, who is the legally elected delegate of the Territory, that I have said what I have. If there is a Territory of Minnesota in existence, (and that there is, the law declares,) then Mr. Kingsbury is the delegate properly elected from that Territory, and entitled to a seat here.

Mr. JONES, of Tennessee. Here is the act organizing the Territory of Minnesota, which declares that—

"From and after the passage of this act all that part of the territory of the United States which lies within the following limits, to wit," &c.

It goes on to give the boundaries of what shall constitute the Territory of Minnesota. Now, you have admitted as a State nearly all of this Territory, and the law says that it shall require all of it to constitute the Territory of Minnesota. Can a Territory exist there when you have admitted as a State that which the law requires shall constitute the Territory? I take it that there is no Territory, and nobody entitled as delegate to a seat here.

Mr. HARRIS, of Illinois. If Congress creates a Territory of one hundred thousand square miles area, and subsequently makes a State out of twenty-five thousand square miles of it, leaving seventy-five thousand square miles of the original area outside of the portion admitted into the Union, with a population scattered over it, and with the existing institutions of counties and towns, I ask if it is legal, if it is consistent, to hold that the admission of the one-fourth abrogates and nullifies the laws as to the other three-fourths, and deprives the people of their right to have represented here, by a delegate, the important interests connected with the public lands, with their intercourse with the Indian tribes, and with everything that would render life desirable? And to do that, too, by the merest, wildest implication in the world! Not a word in the act contemplates such a thing. The precedents from the beginning of the government down do not sanction such a thing, and the House certainly ought not to sanction it now.

Mr. CLARK B. COCHRANE. I desire to ask the gentleman whether, if he were right, it would not follow, as a necessary, legal, logical conclusion, that all the federal officers of the Territory of Minnesota might go back to the wilderness, organize a new government, and hold their respective offices?

Mr. HARRIS, of Illinois. The gentleman begs the question. He proposes to ask if officers could not move back and organize a Territory, while the Territory is already organized under the law. The officers have been heretofore recognized as being in office. It was so in the case of Minnesota, after the admission of Wisconsin. It was so in the case of the Northwest Territory, after the admission of Ohio. The Territory was recognized as in existence, after the admission of a State formed out of part.

Now, as to the inquiry propounded by the gentleman from Tennessee, [Mr. Jones.] He undertakes to draw a distinction as to the area of the Territory that may be included in the State. That does not affect the principle. If the admission of one-fourth or one-tenth does not annul the law and destroy the existence of a Territory, then the admission of nine-tenths does not do it. You must repeal your law by the same power which enacted it, or it still stands upon your statute-book.

Mr. JONES, of Tennessee. If the gentleman will permit me: I think the reverse has been the history of the action of Congress on that subject. The Northwest Territory was formed of all the territory of the United States northwest of the Ohio river. When Ohio was about to be admitted as a State, the Territory of Indiana was organized by act of Congress. Subsequently the Territory of Illinois was organized; subsequently that of Michigan; and subsequently that of Wisconsin; and finally, the remaining fraction of that Territory was included within the Territory of Iowa. If I am right in my recollection of it, Congress never, on the admission of a Territory as a State, recognized, in the Northwest Territory, a Territory under the organization under which a portion had been admitted as a State.

Mr. HARRIS, of Illinois. The gentleman is partly right and partly wrong. He is right in saying that Territories were organized by law after the admission of the States respectively; but he is wrong in saying that the original Territory in existence was abrogated by the admission of a State. I stated yesterday, in my argument, the fact that the delegate from the Territory northwest of the Ohio, who was elected after the admission of the State of Ohio, from the Territory west of the Ohio river, was received, and admitted to a seat on the floor of the House, showing that the House had recognized the existence of the Territory northwest of the Ohio river as entitled to a delegate. I stated also, yesterday, the fact that the territorial officers of the Territory of Minnesota were continued, and a delegate, elected after the admission of the State of Wisconsin, was admitted to a seat in the House. Judicial officers have been uniformly continued in office. All the laws passed by the Territory have continued in full force over all parts of the Territory, after the admission of the State. There is not a solitary departure from that principle—not one. Then, sir, under the provision of law, under the uniform practice of the House, I claim that the committee are right in their conclusions—that the Territory of Minnesota does exist; that it is entitled to a delegate under the law creating it; that the delegate has been already admitted to his seat here, and that he ought not to be ousted from it.

Mr. CURTIS. If we lay this subject upon the table, will the Chair recognize Mr. Kingsbury as delegate any longer than this session?

The SPEAKER. Following the precedents upon the subject, the Chair will be under the necessity of recognizing him till the close of this Congress.

Mr. MAYNARD. What will be the effect, if the subject is not laid on the table, but the resolutions of the majority and minority are voted down?

The SPEAKER. That will leave the report still before the House, and it will be competent to offer any resolution disposing of the subject.

Mr. MAYNARD. In that case would the Chair still recognize the delegate?

The SPEAKER. He would; because the action of the House upon the subject would be negative, and he would be compelled to follow the precedents upon the subject.

Mr. CLARK B. COCHRANE. Would the Chair regard the action of the House, laying this subject on the table, as equivalent to declaring that Mr. Kingsbury was entitled to a seat?

The SPEAKER. The Chair has already stated what would be his ruling in that contingency.

Mr. CLARK B. COCHRANE. Has the previous question been called?

The SPEAKER. It has; but the first question is on the motion of the gentleman from New York [Mr. John Cochrane] to lay the whole subject on the table.

Mr. CLARK B. COCHRANE. I hope that motion will not prevail.

The SPEAKER. There are two motions pending, neither of which is debatable. The Chair cannot indulge the discussion any longer.

Mr. LETCHER. Was the amendment offered by the gentleman from New York received?

The SPEAKER. It was.

Mr. LETCHER. Is it still pending?

The SPEAKER. It is.

Mr. HARRIS, of Illinois. I hope the gentleman from New York will withdraw the motion to lay on the table. I think the House ought to decide this matter one way or the other.

Mr. STANTON. I understand the Speaker to say that if the subject should be laid on the table he would recognize the Territory of Minnesota as an existing territorial organization, entitled to a delegate, and that he will treat the sitting delegate as the delegate for this Congress. That is all I desire to accomplish. I do not care which gentleman sits here as delegate, and I hope, therefore, that the report will be laid on the table.

The question was first on Mr. Hughes's amendment to the amendment, as follows:

"Strike out all after the word 'that' in the amendment, and insert as follows:

"—the admission of the State of Minnesota into the Union with the boundaries prescribed in the act of admission operates as a dissolution of the territorial organization of Minnesota; and that so much of the late Territory of Minnesota as lies without the limits of the present State of Minnesota is without any distinct, legally organized government, and the people thereof are not entitled to a delegate in Congress until that right is conferred upon them by statute."

The yeas and nays were demanded and ordered.

The question was taken; and it was decided in the affirmative—yeas 102, nays 80.

THIRTY-FIFTH CONGRESS, FIRST SESSION.

WHYTE *vs.* HARRIS, *of Maryland.*

The allegations of violence and irregularities were numerous, and the committee held that the election should be treated as a nullity.

The minority of the committee objected to the want of particularity in several of the allegations, and argued that the evidence was insufficient, the most of it being "hearsay testimony." The House laid the whole subject upon the table.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 1, 1858.

Mr. THOMAS L. HARRIS, from the Committee of Elections, submitted the following report:

The subject presented for consideration in this contest involves a question of serious import. The matter to be decided is not simply which of two candidates received the highest number of legal votes cast at the congressional election. It is not a question as to the qualification of electors, of judges of election, or of candidates. It is not as to the formality of returns, nor whether the poll was opened at the right time, and kept open for the required period. It is not

as to the correct counting of ballots, or whether the judges of election were properly sworn and qualified. It is not to consider whether this or that candidate was guilty of corrupt practices or bribery, nor whether this or that individual shall have a seat in Congress as the honored representative of an intelligent constituency of freemen. The question involved is, *shall elections of members to the House of Representatives of the United States be free, fair, and open to the whole body of legal electors?* Will the House require this as a prerequisite to holding a seat within its bar? Or will it receive, without question, whoever may bring a certificate of election? Will it turn a deaf ear to all complaints of fraud, of violence, of riot and bloodshed, even though such complaints are proved as clear as light?

Fortunately for the country, no such case has ever before been presented to Congress; and it is painfully to be regretted that such transactions as are proved in the testimony in this case to have occurred in the city of Baltimore should ever have taken place, and the proofs lodged in the historical archives of the republic. Such events as are here described could never take place in rural districts. A compact, excited and depraved population can alone be the perpetrators of such wrongs, and a comparatively small number may so conduct themselves as to bring great reproach upon an entire city. But an ignorant, depraved rabble, the lowest and basest of a city population, cannot be alone held responsible for persistent violations of law. There are always heads to think and minds to devise the schemes which the ignorant and depraved are but the instruments to carry into effect.

It is not intended to intimate that Baltimore has a worse class of population than other large cities. There is no evidence before the committee that it has. But it is certainly shown that bands of desperadoes have there been organized and used to aid political objects and parties, until a feeling has been engendered which it seems impossible to control—dangerous if not wholly destructive of personal safety and public order. It seems mainly to have been directed against citizens of foreign birth, who have incurred a large share of hatred. But at the late congressional election there, native-born American citizens, as well as those of foreign birth, were abused, maltreated, and their lives put in jeopardy, upon approaching the polls. The violence against them, if they did not belong to the proper political party, seemed almost as uniform and extreme as against citizens of foreign birth, who had taken the oath of allegiance, were citizens of the United States, and entitled to vote under the laws of Maryland. To vote freely, without intimidation or fear of violence, was the birthright of the former, and the constitutional right of the latter; both were shamefully violated and trampled under foot. The freedom and purity of elections constitute the very life of republican government. Life, liberty, property—all depend upon the maintenance of this freedom and purity. Indeed, with freedom and purity wanting, there can be no *election*. It is a fraud, a cheat, to hold anything an *election* which is not the freely expressed will of the whole body of electors, acting intelligently, unbought, and unintimidated.

Was the poll taken in several wards of the city of Baltimore belonging to the third congressional district of Maryland, and in the 12th district of Baltimore county, such an election as this?

What character it is entitled to bear will be seen by an examination of the testimony. Before proceeding to do that, it is proper to state the points in issue between the parties.

The contestant states the grounds of his contest in his letter to the contestee, as follows:

BALTIMORE, *November* 25, 1857.

SIR: I beg leave most respectfully to notify you that I intend to contest the election by virtue of which you are returned as a member of the House of Representatives of the United States to represent the State of Maryland from the third congressional district in the thirty-fifth Congress.

In pursuance of the act of Congress of the 19th of February, 1851, I hereby specify the grounds on which I rely to be as follows:

1. That the election which appears to have been held on the first Wednesday of November, 1857, for a representative in Congress in that part of the third congressional district contained within the first seven wards of Baltimore, was so illegally and improperly conducted as to have been a mockery of the elective franchise.

2. That certain political clubs, or associations of men, intending unlawfully to carry the said election by force, fraud, and violence, combined and conspired and agreed among themselves to exclude and obstruct legal and qualified voters from exercising the right of suffrage; and in pursuance of that combination and agreement did, on the said election day, in the first seven wards of the city of Baltimore, assemble around the polls of said wards, and on the avenues leading thereto, and by threats intimidated, and by force and violence obstructed and drove away from the polls thousands of legal electors who approached the same desiring to vote for me, but were thus prevented from depositing their ballots for me.

3. That by intimidation many voters were deterred from approaching the polls of the several wards aforesaid who would have voted for me.

4. That in all the wards of said city of Baltimore, and within the third congressional district, thousands of ballots were received and counted for you which should have been rejected by the judges, because they were not such ballots as are legalized by the constitution and laws of this State, which secure to the voter the privilege of the secret ballot, and that in lieu thereof the tickets on which your name was printed were so striped with red lines that they became open declarations for you, as if made *viva voce*, which was plainly illegal.

5. That the use of said tickets violated the spirit of the election laws of this State, in that they notified all persons how the electors were voting, and subjected to violence and ill usage all persons not offering to vote such striped ballots.

6. That in the first ward of said city, comprised in the third district, there was placed in front of the place of voting a cannon, mounted and loaded, and exposed to public view, and which had been taken to said place through the streets of said ward on the evening preceding the election by twenty or thirty men, armed with muskets and guns, and which said cannon was so placed at said polls with the design on the part of said men to intimidate legal voters, and that voters in number more than five hundred were so intimidated and deterred from approaching said polls because of said armed and avowed preparation to repel them, and because on a former election day many of them had been maltreated and beaten by persons then surrounding the polls.

7. That the election in the first, second, and fifth wards of said city was unlawfully, irregularly, and loosely conducted, in that the judges, or some of them, received at the windows many hundreds of ballots from persons offering to vote which were not deposited in the ballot-boxes, but were destroyed by the judges.

8. That the polls in said first ward of said city were not held at the usual place, but far remote from the centre of the ward and its populous section.

9. That in the second ward of said city but two judges were commissioned and acted, although a third person was suggested for judge to the mayor, who neglected or refused to appoint him.

10. That the polls of said second ward were located at a place unfrequented by reputable persons, and in immediate proximity to the headquarters of a notorious political club, known as the "Rough Skins," which was unusual and irregular, and prevented many qualified electors from voting for me, from a reasonable and well-grounded fear of violence.

11. That in the second ward of said city many voters legally qualified and desiring to vote for me were rejected by the judges, and that many persons not legally entitled were permitted to vote for you.

12. That the polls of the third ward in said city were removed from the usual place of voting, and located at a house where the American party of that ward hold their headquarters, and where the American Riflemen kept their armory, which was done to intimidate voters, and did so intimidate them and prevent their approach to said polls.

13. That the polls of the fifth, sixth, and seventh wards were located on the boundaries of said wards, far away from the centres, and inconvenient to be approached by the citizens of the said wards.

14. That in the fourth ward of said city the votes received and counted by the judges for you exceed in number, by more than five hundred, the legal voters of that ward of both political parties.

15. That in the sixth ward of said city sundry minors and women were permitted to vote for you.

16. That in all the first seven wards of said city sundry persons were allowed to vote for you who were not legally entitled to vote, and many voted more than once for you.

17. That in the eighth district of Baltimore county, comprised within the third congressional district, twenty or more desperate men went from the city of Baltimore to a house near the place of voting in said district, on the night preceding the election day, and next day marched in front of the polls with arms in their hands to intimidate the electors, and did so intimidate them; and, although not legal residents of the district, voted for you, some voting but once, others oftener, which ballots were counted and reckoned for you.

18. That in the twelfth district of Baltimore county, comprised in said third congressional district, a body of armed men in an omnibus proceeded from Baltimore city to the place of voting in said district, and there, by threats and the exhibition of guns and pistols, intimidated and deterred from voting sundry electors duly qualified, who were about to vote for me; and that said band of men subsequently drove by force many voters from approaching the polls, and in one instance attacked and drove back eleven or more voters in a body, who were on their way to the polls intending to vote for me, by which means the majority in that district for me was greatly diminished.

19. That by a general system of threats, violence, and abuse, many voters were intimidated so greatly that they dared not approach the polls of said district.

Should these allegations be substantiated by proof, as I am sure they will be, then I claim to have been elected by a majority of the sound and legal voters of the third district, and am entitled to a seat in the 35th Congress from the third congressional district of Maryland, or at least to the submission of the question again to the people.

I am, very respectfully, your obedient servant,

WM. PINKNEY WHYTE.

Hon. J. MORRISON HARRIS.

To all these charges and specifications the contestee, by his answer of December 21, 1857, either makes absolute denial, interposes explanations, or denies knowledge of the allegations. The contestee, after this, proceeds as follows:

And I do charge, and expect to sustain by proof, that in addition to illegal votes polled for you at the polls of all the other wards of said city, that in the eighth ward thereof, also within the congressional district, a large number of illegal votes were received and counted for you, and that the majority shown for you in said ward was swollen by the polling in your favor of at least one thousand illegal and fraudulent votes; and I further charge, that if, as alleged by you, intimidation of voters and reasonable apprehension of personal violence and danger constitute a cause for vacating an election, that the notorious character of the said ward for violence created, with hundreds of the legal and qualified voters of said ward, who would have voted for me, a reasonable and well-grounded fear that the attempt to exercise their right of suffrage at the said polls would be attended with great personal risk and danger; and that, in consequence thereof, they refrained from any attempt to vote, thus decreasing the vote to which I was entitled in the said ward.

And I do further charge, that on the day of said election a large number of legal and qualified voters of the eighth election district of Baltimore county, being within the congressional district, were prevented from voting for me by the presence, in the immediate vicinity of the polls, of nearly one hundred armed men of your party; and that a large number of illegal votes were also received and counted for you at said polls.

And I do further maintain and insist that, if there existed any necessity for accounting for the largeness of my majority apart from ordinary party strength, it would be largely explained by the fact of the unconstitutional and illegal attempt upon the part of the governor of Maryland to overawe the elections and control the suffrages of the people of Baltimore, by his attempt to use military force upon the day of said election.

For all which reasons I do not doubt the validity of my election as the representative of the third congressional district of Maryland to the thirty-fifth Congress of the United States.

I am, respectfully, your obedient servant,

J. MORRISON HARRIS.

WILLIAM PINKNEY WHYTE, Esq."

[The majority report proceeds to give the alleged facts of the election, the returned majority for the incumbent being 3,318. The majority of the same candidate two years previous in a congressional election was but 56. The evidence is copiously cited to show that anarchy prevailed in Baltimore during the election.]

There is one fact stated by all the witnesses interrogated upon this subject, that the tickets used by the American party were distinguished by a number of red perpendicular stripes across them, so as to be readily known as a voter approached the polls; some of these tickets are filed as exhibits. It is clear to the committee that such marks upon ballots are in violation of the spirit of the law that provides for a ballot system; one of its great objects, if not its greatest one, is to allow the elector to make his choice by a secret vote.

* * * With such evidence before the committee, the next inquiry is, What is to be done? What is the law of elections applicable to such a case?

The decisions of contested election cases in England have long since settled the law as to the effect of riots at the polls. Numerous cases have been determined by the Commons, setting aside and making void elections where the violence and tumult were incomparably less than in this case.—See 3 Ed. I, c. 5, where it is enacted, "because elections ought to be free, the King commandeth, upon great forfeiture, that no man, by force of arms, nor by malice, or menacing, shall disturb any to make free election."—(2 Inst., 168.) By Stat. 13 Hen. IV, c. 7, it is required that "sheriffs and justices of the peace shall repress riots with the power of the county."

"The Stat. 1 W. & M., sess. 2, c. 2, s. 1, after reciting, as one of the grounds of the abdication of James, 'the violating the freedom of election of members to serve in Parliament,' declares 'that elections of members of Parliament ought to be free,' this being one of the undoubted rights and liberties therein claimed and recognized."

"The freedom of action thus solemnly confirmed the law will not suffer to be endangered either by seduction and persuasion or by awe and intimidation. Therefore it is that neither practices of bribery and corruption, nor the interposition of illegal influence, nor the presence of a military force during an election, nor the interruption of the proceedings by riot and disturbance, can in any degree be endured by the Constitution."—(Vide Neale on Elections, 63.)

"It only remains to observe, that whenever there has been an interruption of the proceedings by riot and tumult, notwithstanding the returning officer has been able to continue and finish the poll, and to comply with the exigency of the writ, by the return of members, election has been holden totally void."—(Idem, p. 125.) For this cause the elections for *Pontefract*, 28th May, 1624, were declared void, (1 Jour., 797;) *Southwark*, 10th December, 1702, (14 Jour., 24;) *Coventry*, 5th February, 1706, (15 Jour., 278;) *Westminster*, 6th November, 1722, (20 Jour., 53;) *Coventry*, 20th November, 1722, and 22d March, 1736, (20 Jour., 60, and 22 Jour., 819;) *Westminster*, 22d December, 1741, (24 Jour., 37;) *Pontefract*, 24th November, 1768, (32 Jour., 68; *Westminster*, November 6, 1772, (Chamb. Elec., 607;) *Nottingham*, in 1803, (1 Peck., 77.)

The law of elections is thus well settled in England, that a riot or tumult, or a display of numerical strength accompanied with threats, even though no actual violence takes place, or conduct of parties engaged being such as to strike terror into the mind of a man of ordinary firmness, and deter him from proceeding to the poll, the election will be held not to be free, and will be declared void.—(Com. Jour., IX, 631; Hey., 546.) "And where the proceedings at an election are interrupted by riots, the election will be held void without reference to the number of votes affected thereby."—(Rog. on Elec., 243.)

Yet it seems necessary to the existence of such a riot as will avoid an election that it should be founded on system, or at least upon premeditation; for a casual affray or an incidental disturbance, without any intention of overawing or intimidating the electors, cannot be considered as affecting the freedom of elections.—(Rog. on Elec., 242; Trigg *vs.* Preston, Cont. Elec., 78.)

It is fortunate and gratifying to know, that since the adoption of the Constitution of the United States not a case has been presented to Congress showing the existence of any riot or tumult, at an election for any of its members, going to affect its fairness and freedom, and but two where even allegations of such conduct having been manifested at the polls have been made.—(Trigg *vs.* Preston, Con. Elec., 78; Biddle & Richard *vs.* Wing, id., 504.) In neither case was there anything amounting to a riot or an obstruction to the polls shown. In both cases the sufficiency of the alleged *cause* is not questioned, but the proofs do not make out the cases. Indeed, in the latter, the committee indicate that, if the proof showed a state of things incompatible with the purity and fairness of the election, it would be sufficient to determine the question.

Having, then, no case heretofore presented to this house involving a decision as to what extent violence, intimidation, and riot may prevail at elections to warrant a vacation of a seat, we can only refer to the numerous precedents which we find settled by other elective bodies, and to the plain teachings which we derive from our Constitution and theory of government.

In the judgment of the Committee of Elections, these require the return in this case to be set aside and the seat vacated. It cannot be considered the return of an election made by the legal voters of the third congressional district of Maryland. *An* ELECTION *is the* FREE CHOICE *by those who have the* RIGHT TO MAKE IT, *and who* DESIRE *and* SEEK *to make it,* UNCOMPELLED, UNAWED, AND UNINTIMIDATED. The return here was based upon votes alleged to have been cast in that congressional district. The proofs show that at the first eight wards of the city of Baltimore, and at the twelfth election district of Baltimore county, (comprising about five-sixths of the returned votes,) in some to a much greater extent than others, but in all to a most culpable extent, violence, tumult, riot, and general lawlessness prevailed. That, as a consequence, the reception of illegal votes and the rejection of legal votes, the acts of disturbance and assault committed on peaceable citizens, and the intimidation of voters, so predominated as to destroy all confidence in the election as being the expression of the free voice of the people of that congressional district.

The committee are not unmindful of the magnitude of the question they present to the consideration of the House. On the one hand it involves the vacation, temporarily, of a seat in the House of Representatives; on the other, it requires an acquiescence in, if not approval of, a wanton and unjustifiable interference with the most sacred of all political rights to a free people. The freedom of the ballot-box and the purity of the elective franchise are the fountains of our political life; corrupt or choke them in their pure, free flow, and the fair fields of the republic become a desert waste, and the haunts of those political beasts, demagogues and traitors. If the case presented is not one that calls for the interposition of the House, the committee cannot conceive what would be sufficient. Let this be held a good and valid election, and hereafter no return can be justly questioned. It matters not who may be the returned member, nor what may be his standing or talents. It is the *election*, and not the *individual*, with which the House has to deal; and it is proper to remark in this connexion, that there is no proof in the whole mass of evidence that shows that the sitting member had anything to do with, or in any way countenanced, the acts complained of. But this is not enough. Those who seek, by undue and unlawful means, to place men in public positions in offices of honor or power should be advised that by the use of such means they will assuredly defeat their object. * * * * * *

The committee submit in conclusion the following resolution:

Resolved, That it appears to this house that there was such tumult, disorder, riot, intimidation, and injustice, in the election of a representative to Congress from the third congressional district of the State of Maryland, on the third day of November last, in contempt of law and in violation of the freedom of elections, that the said election is void, the seat from the said district is hereby declared vacant, and the Speaker of this house be and is directed to notify the governor of said State thereof.

The minority of the committee submitted to the House an important report. In it they hold that allegations 1st, 2d, 3d, 15th, 17th, 18th, and 19th are too loose and vague to give the sitting member the notice contemplated in the act of Congress. Particularity of specification was required before the passage of the law of 1851, and absolutely necessary since.

Not only are the allegations of this contestant insufficient, in view of the above authorities, *but they do not even indicate the class of the voters objected to*

as illegal, which was held to be the saving point as to the allegations of contestant in the case of Vallandigham *vs.* Campbell, by a portion of the committee in their report upon that case.

The allegations which are based upon what the contestant calls "intimidation of voters," contain, in our opinion, no grounds upon which the election can be declared void, even if they should be considered sufficiently proved, which we deny is the case. The doctrine is a novel one, and if recognized would lead to infinite embarrassment and injustice in the adjudication of cases of contested election. It would, indeed, be almost impossible to limit the application of the rule, if it be applied at all, or to establish a scale of timidity, for as the nervous constitutions of men differ widely, so would the causes of apprehension, and the rule applicable to one man would not meet the case of another.

We consider the principle far too dangerous and too loose to justify us for a moment in adopting it; and we are aware of but one case in which the plea was attempted to be set up, and in that case we think that a fair rule was laid down. The question arose in the case of Biddle & Richard *vs.* Wing, Contested Election Cases, p. 507; where the committee held that they were not called upon to inquire into the causes which prevented a candidate from getting votes enough to entitle him to the seat, but that it is only required of them to ascertain who had the greatest number of legal votes actually given at the election. An election, they say, is the act of selecting, on the part of the electors, a person for an office of trust. The inspectors of the election are constituted judges of the qualifications of the electors, and exercise, from necessity, a discretionary power; *if they err*, and reject a legal vote, or an elector, *for any cause*, fails to present it for their reception, *the nature of the case precludes it from entering into the consideration of the general result of the election*, unless, indeed, corruption should appear sufficient to destroy all confidence in the purity and fairness of the whole proceeding; which corruption the whole context shows to be *a corruption on the part of the officers conducting the election*, which is nowhere charged by the contestant to have existed in his case. It is properly a question between *those officers* and the injured party; and the laws of the Territory (as in this case the laws of the State of Maryland) make ample provision for guarding the purity of the election, and for the punishment of offences against the rights of citizens in that respect. In case of the application of a contrary doctrine, the greatest uncertainty would necessarily prevail; and it would be putting it in the power of a few riotous individuals to defeat any election. "*The law appoints a particular time and place for the expression of the public voice; and when that time is passed it is too late to inquire who did not vote, or the reason why; the only question being for whom the greatest number of legal votes was cast.*"—(P. 507.)

In the case we are considering, a large number of names are given of persons who, it is alleged, were "intimidated;" and we will consider directly the curious and insufficient manner in which their assumed intimidation is sought to be established, only premising that, except in isolated cases, it is nowhere shown that these men would have voted for the contestant if they had gone to the polls, whether they were really entitled to vote, or what were the causes of their intimidation, so that a judgment could be formed of its reasonableness and force; nor is it shown that any condition of things at the polls themselves on the day of election was brought to their knowledge, even if anything actually occurred there, reasonably calculated to inspire fear.

In the 4th and 5th allegations of his notice, this contestant presents another objection to the validity of this election, which, while it is entirely new, does not require, in our opinion, any extended notice. He claims to have rejected all the ballots cast for the sitting member upon the ground that they were striped on the back with red lines. The constitution of the State of Maryland, article 1st, section 2d, provides that "the vote shall be by ballot;" and the act

of assembly regulating elections, 1805, chapter 97, section 12, provides "that upon the ballot shall be written or printed the name or names of the persons voted for, and the purpose for which the vote is given, plainly designated." It is not pretended that this was not done, and we cannot for a moment admit that the marks on the ticket, or the color of the paper on which the name and office are thus plainly designated, have anything to do with the legality of the vote cast, or are to be held as infringing the law of the State.

The minority report argues that the allegations referring to the *location of the polls* are fully met by the law of Maryland; that the 7th allegation was not proved. A long statement of the facts of the case follows. The report continues:

Having thus reviewed the allegations of the contestant, before we proceed to analyze the manner in which he attempts to establish the gravest of his charges against this election, we would state that it is by *hearsay testimony*, and that of the lowest grade and the worst sort. It is such testimony as would be held insufficient to establish a claim in the most inferior class of civil tribunals, and which, the undersigned think, ought not for a moment to be considered as influential in deciding a case of such magnitude as the seat of a member and the representation of a people. The just rule, in connexion with this class of evidence, is well stated in 1 Greenleaf on Evidence, p. 115:

> Hearsay evidence is uniformly incompetent to establish *any specific fact which in its nature is susceptible of being proved by witnesses who speak from their own knowledge.* That it supposes something better that might be adduced in the particular cases is not the only ground of its exclusion. Its intrinsic weakness, its incompetency to satisfy the mind as to the existence of the fact, and the frauds which may be practiced under its cover, all combine to support the rule *that hearsay evidence is wholly inadmissible.*

[The exceptions to the rule are well known—such as cases of pedigree, inscriptions on tombstones, &c.] Chief Justice Marshall, in the case of Minor Queen *vs.* Hepburn, 7 Cranch, 290, emphasizes this doctrine, in saying that "all questions upon the rule of evidence are of vast importance to all orders and degrees of men—our lives, our liberty, our property, are all concerned in the support of these rules *which have been matured by the wisdom of ages. One of them is that hearsay evidence is* TOTALLY INADMISSIBLE." This rule was also strictly applied in an election case in the English Parliament, cited in Rogers's Law and Practice of Elections, p. 172, where "it was proposed that a witness should be sent for to prove a conversation with one Delande, *upon the ground that he* (Delande) *could not be found to be served with the Speaker's writ;* but, on argument, it was refused." A greatly stronger election case than the one now being considered, for it is nowhere pretended that the witnesses, conversations with whom are here attempted to be proved, were not within the reach of a writ, but where, in fact, the contestant discloses his knowledge of their names, and, in most cases, of their residence.

We cite further upon this proposition, (Davis *vs.* Wood, 1 Wheaton, p. 6; Rex *vs.* Eviswell, 1 Term Rep., 707,) and refer to the strong condemnatory language held by the minority in their report in the case of Archer *vs.* Allen, in the 34th Congress.

The contestant, in his argument before the committee, having at the outset *declared that there was but one issue presented by him, and which he proposed to discuss, namely, his right to the seat*, and having urged the committee *not to consider the question of a return of the election to the people*, and the committee having, without dissent, ruled *that he had no claim to the seat*, but held by a majority vote that the election should go back, we are now called upon to consider the case in a point of view *not argued by the parties before us*, and in doing so it becomes necessary to analyze, to some extent, the mode by which the contestant sought to prove that by intimidation of voters, and by illegal

votes, his claim to the seat was made out; because we must suppose that while the majority of the committee did not consider either the fact or the proof on these points of any value in connexion with that claim, they took them into consideration in deciding that the election should be sent back.

We regard the contestant's proof, on both these points, as wholly vicious and inadmissible. Lists are filed by him of names of persons in the different wards who, it is claimed, did not vote because they were "intimidated." These lists are obtained, as the evidence shows, by sending men into the various wards, who, dividing them into different districts, make out *separate lists* of such persons as they are assumed to have seen or heard from, stating that the persons whose names they thus return were "intimidated." They do not state, except in comparatively isolated cases, that they knew the persons to be qualified voters, or what was the ground or reason of what they call their intimidation. In a vast number of cases they do not know personally those they see; many they do not even see personally, *but get the information they report from their wives, their children, their neighbors, or their landlords;* and then, to add to the absurd insufficiency of such proof, in the case of a number of these lists, they are put in evidence by the person who makes up the general list filed *from these separate lists thus handed in to him*, and the separate lists, in many cases, are not proved by those who collected the information in them, and many of these persons are not even put upon the stand.

The contestant claimed that certain alleged intimidated votes should be added to his poll. He afterwards abandoned that position and claimed to use the evidence as a part of the *res gestæ* of the case. The minority remark upon this:

The first position was certainly untenable, and we consider the second to be equally so; for the doctrine of *res gestæ* is clearly laid down in the books, and we hold the rule to be, that when it is necessary in the course of a cause to inquire into the nature of a particular act, or the intention of the person who did it, proof of *what he said at the time of doing it* may be admitted to show its true character. As in an indictment for rape, what the girl said *so recently after the fact as to exclude the possibility of her having been practiced upon*, has been held admissible as a part of the transaction.—(East's S. C., 415; 1 Starkie's Cases, 241; 1 Starkie on Ev., 47.)

So have declarations, *accompanying* a purchase of goods, been held admissible to show whether a person sought his living by buying and selling.

And, *in the leading case* on this subject, a conversation was allowed to be given in evidence which had passed on the party's return home, after he had been absent *nearly two days*.—(1 Phillips on Evidence, 198.)

The lists of the contestant, to which he proposes to extend this rule, were filed in the case; one of them *on the 19th of January*, 1858, (the election being on the 4th of November preceding,) and the rest of them are not produced until the close of the testimony, which was on the 24th of February, showing an interval of weeks, and even months, between the thing assumed to have been done by the parties and the evidence sought to be given in explanation of their motive in doing it, while we find no proof of the time when the statements of the parties are said to have been made; and we hold all the declarations of these lists to be wholly outside the rule of law cited by the contestant.

* * * * * We come now to consider the alleged violence at the polls; and in this connexion we desire to say, first, that the only cases in our knowledge in which elections have been set aside for this cause, are cases where there was riot at the polls, or such tumult as interfered with the election and prevented an ascertainment of the result. This rule is laid down in 2 Hayward on County

Elections, pp. 580, 581, 582, 584. This was a case where a riot occurred at the polls, that led to the assault of the high sheriff in the execution of his duty, *and was of such a character as led to the closing of the poll*, and the election was set aside upon this ground and the illegal conduct of the high sheriff.

Another case will be found in 1 Rowe on Elections, p. 334, where there was such riot and tumult as to interrupt the election.

And another case, in Sheppard on Elections, pp. 105. 106, where it was held that, *if riots are carried to a great extent*, accompanied with personal intimidation so as to exclude the possibility of a fair exercise of the franchise, they will avoid the election; as where, in this case, the *returning officer, being alarmed by the mob, offered to return whoever the sitting member chose to name, and he indicating himself, the sheriff returned him.*

And it is further laid down in 4 Selden, pp. 93 and 94, that, "*should a gang of rowdies gain possession of the ballot-box before or after the canvass of the votes, and destroy the whole or a portion of the ballots* or introduce others into the box *surreptitiously*, so as to render it *impossible to ascertain the number of genuine ballots, the whole should be rejected.*"

Now, it is very clear, from the evidence, that no such condition of things existed in the case under consideration. At every one of the polling places, in the district of the sitting member, the election was uninterrupted; the votes were all quietly canvassed; the judges signed the returns; they were transmitted, as the law requires, to the governor of the State; the governor made proclamation of the result, and transmitted to the sitting member a certificate of his due election.

He is therefore, in his seat under all the observed solemnities of the laws of Maryland; and the sole question remaining for our consideration is how far the violence, which it is urged by the contestant existed at the polls, can be held important, in connexion with the resolution of the majority of the committee to return the election to the people.

There is a great deal of evidence adduced by the sitting member as to the general character of the election, while it is clear, from the exhibits filed in the case, that the military intervention of the governor of the State caused, as was to be expected, a deep feeling, especially with the American party of the district, and threw into the contest a new and dangerous element of excitement. It is shown, by the testimony of *some 55 witnesses*, that the election was generally very quiet—more so, some of them testify, than for many years previous; that there was no obstruction of the polls beyond the ordinary pushing, crowding, and confusion incident to elections in the city; and that there were no bodies of men in the neighborhood of the polls preventing legal voters from approaching them.

The minority report concludes as follows:

The undersigned regret sincerely that all our elections are not conducted with the most absolute order and decorum; but they cannot lose sight of the fact, that an election in this country means the transfer of political power, elsewhere achieved by the bayonet, through the struggle of the polls; and that it must needs happen that these conflicts will be sharp and earnest, and that it is a most dangerous rule for this house to establish, that it is to measure the quantum of violence that will deprive a people of their great prerogative of representation, or that it will regulate the police details of our great cities. Let us once establish the precedent that representatives are to be unseated, and the will of the people, especially when expressed by large majorities, overruled, because of violence at the polls, and, while it will put all our city elections in the power of the riotous and rowdy, it will inaugurate a new rule as to future cases as unsound in principle as it will be bitter in its fruits.

In closing, we may state, in connexion with the alleged absence of democratic voters from the polls, that it is shown by the contestant's own proof that the democratic party nominated no general ticket at the recent election in Baltimore, (Thomas H. Moore, p. 115;) while it is proved, on the part of the sitting member, that it was a common report among the democrats of his district that the election would be contested; that there was a democratic majority in the House, and Mr. Harris would be thrown out; that bets were offered on this result, and it was assigned by many democrats as a reason why they would not vote, being given by some even at the polls, while admitting at the time there was nothing to prevent them from voting.

The official exhibits, filed on pages 668 and 669, show that, at the election in the third district of Maryland, in the eight wards of the city, Mr. Harris received 7,307 votes; Mr. Whyte received 4,064 votes. In the five county districts, Mr. Harris received 1,455 votes; Mr. Whyte received 1,380 votes. Showing a majority for Mr. Harris, in the wards of the city, of 3,243 votes; in the county districts, of 75 votes; so that he has a clear majority outside of the whole city vote.

For all which reasons we are decidedly of opinion that the sitting member is properly in his seat, and that no case is presented that would make it proper for the House to order a new election.

EZRA CLARK, JR.
JOHN A. GILMER.
JAMES WILSON.

The undersigned agrees with his colleagues of the minority in the result at which they have arrived.

ISRAEL WASHBURN, JR.

The House tabled the whole subject, December 16, 1858—yeas 106, nays 97.

There was no debate upon the merits of the question.

THIRTY-FIFTH CONGRESS, SECOND SESSION.

CHAPMAN *vs.* FERGUSON, *of Nebraska.*

Where legal votes were cast in certain precincts for the contestant, but were not counted by the territorial canvassers, held by the committee that the contestant was entitled to the votes.

The sitting member having made oath that he knew nothing of the testimony in the case, having been absent from the Territory, the House granted further time for the taking of testimony.

There was a preliminary contest in this case over the application of the sitting delegate for further time to take supplemental testimony. The committee made the subjoined report upon the preliminary question:

The Committee of Elections, to whom was referred the memorial of Bird B. Chapman, contesting the right of the Hon. Fenner Ferguson to a seat in the House of Representatives of the 35th Congress as a delegate from the Territory of Nebraska, submit as a special report—

That the election out of which this contest arises was held in August last, and the result of the said election was not officially announced until the 3d day of September following; that the contestant gave notice to the sitting member, on the 16th day of September, of his intention to contest his right to a seat, and the response of the sitting member to said notice, dated October 2, 1857, was served on the 10th day of that month on the contestant.

No notice of intention to take testimony was given by the contestant until the 13th and 14th days of November, when more than one-half of the time allowed by law to take the same had expired, nor until after the sitting member had left the Territory for this city to enter upon the discharge of his duties. The sitting member has made oath that he knew nothing of the testimony taken in this case until he saw it printed in Miscellaneous Document No. 5, of this House, and that he has had no opportunity to rebut and disprove the same.

Your committee are of opinion that the sitting member erred in not leaving an acknowledged attorney in the Territory to look after the contest, of which he had been notified; and were the contestant and the sitting member alone those who have an interest in its decision, your committee might hesitate before coming to the conclusion to which they have arrived. The question to solve is, not simply what these parties have done or omitted to do, but what was the expressed wish of the people of Nebraska, as between these candidates, at their late election? And what is a reasonable time and indulgence, under the circumstances, to obtain proof of that wish?

As the contestant permitted more than one-half of the time allowed by law to elapse before commencing his proof, he can have but little cause for complaint should the period for taking proofs be extended. And as the election has been so recently held, and the contestee averring that he never had any notice of taking testimony, your committee are of opinion that justice to the contestee, as well as to the people of Nebraska, requires that time be given to take further evidence. They therefore recommend the adoption of the following resolution:

Resolved, That the parties, the contestant and contestee, in this case, be allowed the further time of sixty days from the passage of this resolution to take and return supplemental testimony.

The House adopted the resolution. The report upon the main contest follows:

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 4, 1859.

Mr. WILSON, from the Committee of Elections, made the following report:

That the whole number of votes which were counted by the territorial canvassers for the said contestant and for the said sitting delegate was 3,251, of which number the contestant had 1,597 and the sitting delegate 1,654, giving to the sitting delegate a majority of 57.

It appears, however, by the statements and admissions of the parties, and the evidence taken in the case, that the votes cast in a number of the precincts in said Territory were not counted by the election officers, and did not in any way contribute to the result above stated.

For instance, five votes returned as having been cast for "Judge Ferguson," instead of "Fenner Ferguson," and rejected for that reason by the board of canvassers, the committee have considered as belonging to the sitting delegate, and have added the same to his vote, making his total vote 1,659.

Again: the contestant proved that votes cast for him at the Bellevue precinct were rejected by the board of election because the ballots read "Bird B. Chapman for Congress," instead of "For Congress, Bird B. Chapman."—(See Wm. R. Watson's deposition, Ho. Mis. Doc. 5, page 17, 1st sess. present Congress.)

Contestant also proves that ten votes cast for him at the Cuming City precinct were not counted for him by the territorial canvassers, inasmuch as the judges of the election did not return the poll-books of said precinct to the county clerk within three days after the election, as required by law, by reason of which the county clerk failed to certify the same in his abstract to the governor.—(See certificate of said county clerk, Ho. Mis. Doc. 28, page 34, present session.)

The votes so excluded had been legally cast. No question has been or is now raised as to the voters being actual residents of the precinct, and entitled to vote. The committee, therefore, have, in accordance with the precedents established in Richards's case, Bard's case, Spaulding *vs.* Mead, also Mallory *vs.* Merrill, Contested Election Cases, pages 95, 116, 117, 159, and 229, added them to the vote of contestant, making his vote 1,608.

This total vote given to contestant the sitting delegate has failed to invalidate or question by any evidence before the committee. In fact, the sitting delegate admits the regularity of this vote. On the other hand, it is shown by contestant (see depositions of John Reck, Samuel B. Nichols, and poll-list, House Mis. Doc. 5, pages 10, 11, 24, 25, and 31) that at the Cleveland precinct, which is situated 83 miles in the interior of the Territory, and where there are only five dwellings, and they of a temporary character, there were *only six persons residing* in said precinct who voted at said election, and yet thirty-five were returned as having voted for the sitting delegate, and *one* for the contestant.

It is true that the sitting delegate has offered evidence to prove that a larger number of voters resided at said precinct; but your committee are of the opinion that said evidence should be taken with great allowance, as the witnesses are principally those who are charged by the contestant with voting or acting illegally at said precinct, which charges, in the opinion of the committee, seem to be established.

It is further shown (see House Mis. Doc. 28, page 33) that the officers of the election at said precinct were not sworn by any duly qualified officer of the Territory, or any person having authority to administer an oath in said cases, which, by the precedent established in the contested election cases of McFarland *vs.* Culpepper, McFarland *vs.* Purviance, and Scott *vs.* Easton, pages 131, 221, 273, vitiates the election. Yet the committee, wishing to deprive no citizen of his vote, if actually and fairly cast, have in this only rejected the clearly illegal votes, to wit, twenty-five.

At the Monroe precinct, ninety-three miles in the interior of the Territory, 87 votes were returned as having been cast, 82 of which for the sitting delegate and *one* for the contestant. The committee are of opinion, as is clearly shown by the testimony of John Reck, Samuel B. Nichols, and the poll-list of said precinct, (see House Mis. Doc. 5, pages 11, 12, 24, 25, 32, and 33,) that the most *flagrant* illegalities and frauds were perpetrated in said precinct, in receiving the votes of persons known to be foreigners, and others not inhabitants of the precinct entitled to vote, and in putting on the poll-list as having voted the names of fictitious persons such as "*Oliver Twist*" and "*Samuel Weller;*" and the committee are further of the opinion that not only are said names fictitious, but also that *they could not have been placed upon the poll-list except by a corrupt collusion of the judges and clerks of said election;* and permitting *this*, of which there can be no doubt, we feel great doubt in giving credit to any part of the entire poll; that of the forty-five persons who *may* have actually voted at said precinct, it appears that over forty of them were Mormons, and two-thirds of them were foreigners; that at the place of holding the election there were *only two dwellings* inhabited, and they were temporary sod or log shanties; that the election officers at the precinct did not take the oath required by the laws of Nebraska, neither were they sworn by any officer having authority to administer oaths in said cases.

The committee have rejected from this poll forty-two, as clearly illegal, fraudulent, or fictitious.

At the Florence precinct 401 votes were returned as having been cast, of which 364 were for the sitting delegate and 4 for the contestant. The committee find by reference to the return made to the governor by the county board of canvassers who canvassed the vote, (see House Miscellaneous Document No. 5, pages 67 and 68,) that because the polls in this precinct having been kept open

until after the hour of six o'clock p. m., the laws of Nebraska providing that the polls shall be opened at nine and be kept open until six o'clock p. m., and because votes were cast between the hours of eight and nine in the evening, it was *unanimously* recommended by the said county canvassers that this whole poll should be rejected. This they present as a part of the true history of the case and the opinion of those interested in conducting the election.

However, it is shown by the testimony of Edward Creighton, (House Miscellaneous Document No. 5, p. 23,) that after the hour of five p. m. the judges of said election announced that there were only 271 votes then polled, and by the testimony of Timothy Donovan, page 19 of Document 5, that between the hours of eight and nine in the evening the judges of the election announced that 373 votes only were then polled; and by same witness, that during the same evening he saw one person vote *four* or *five times*. Also, by same witness and the testimony of Oscar B. Selden, (see pages 13, 14, 15, and 16 of Document 5.) that a large proportion of the residents of Florence precinct were Mormons, and that a large proportion of the names found on the Florence poll-list he, though an old resident, did not know. It further appears, by a comparison of said poll-list with the one returned from said precinct for the election held one year afterwards, (for said poll-lists see Document 5, page 37, and Document 28, page 28,) that there was a falling off of the vote in that precinct of nearly *two-thirds*, and that *only seventy-eight names of the four hundred and one* returned as having voted at the election for delegate are found on the list of the subsequent year's election. It is further shown that the officers of the said election precinct were not sworn before any officer qualified by the laws of Nebraska to administer oaths in such cases.

These numerous evidences of illegalities and frauds practiced at this precinct, in the opinion of the committee, justify the rejection of the whole poll. If, however, it should be considered that the facts above set forth are not sufficient to set aside the entire poll, still the preponderance of the evidence shows that the number of votes cast at said precinct after the hour of six o'clock p. m. for the sitting delegate, and the many other fraudulent and spurious votes there and at other precincts recorded for him, clearly entitle the contestant to the seat. The committee deduct the four votes cast for the contestant at the Florence precinct. They also deduct from the vote counted for the sitting delegate at said precinct, to wit, 364, which, with the twenty-five rejected from the Cleveland poll, and forty-two from the Monroe poll, gives to the contestant a majority of 376.

The committee therefore recommend the adoption of the following resolution:

Resolved, That Bird B. Chapman is the legally elected delegate to the thirty-fifth Congress from the Territory of Nebraska, and is entitled to his seat as such delegate.

JOS. WILSON.
JOHN A. GILMER.
EZRA CLARK, JR.
JAMES M. CAVANAUGH.

Without adopting all the arguments of the committee, we agree in the conclusion to which they have arrived.

L. Q. C. LAMAR.
J. W. STEVENSON.

MINORITY REPORT.

FEBRUARY 4, 1859.

Mr. BOYCE, from the Committee of Elections, submitted the following views of the minority:

The facts of the case sufficiently appear from the report of the majority of

the committee. We think it only necessary, therefore, to allude to the points of difference between the majority and minority of the committee. Those points of difference are in reference to the Cleveland, the Monroe, and the Florence precincts. In order to a correct understanding of these points of difference a brief analysis of the evidence is proper.

In reference to the Cleveland precinct, the contestant introduced the following evidence:

Cleveland precinct.

John Reck knows every resident of Cleveland precinct; six of those on the poll-list were then residents of the precinct; most of those on the poll-list resided at Florence, in another county.

O. B. Selden said eight of the voters at Cleveland precinct lived at Florence.—(Page 16.)

Samuel B. Nichols said: "I first visited the Cleveland precinct; I inquired of every person I could see, of whom I thought I could get any information, as to the voters in said precinct at that election; I went to the clerks and one of the judges of election and asked permission to take a copy of the poll-list; I failed to obtain one; I made the same inquiries of them as of others relative to the number of voters; those of whom I inquired made contradictory statements as to the number; the highest number which any one gave as living in the Cleveland settlement on the day of election was sixteen; they claimed that there were a number living on Shell creek, in the precinct; all that I could find from any reliable information as residents in the whole precinct, either on the day of election or when I was there, were *ten;* I found living at the Cleveland settlement only four men who claimed to have voted at said election; there were only seven men living in the whole precinct, and only six of them claimed to have voted; this number included all who lived on Shell creek; I went to Shell creek and found all the houses and made inquiries of all the persons I could find as to the number of persons then living on Shell creek, in Monroe county, or who lived there at the time of the election; the number of adult males then living there was three, and the number living there at the time of the election was *four*, as stated by all persons of whom I inquired."

Ferguson's testimony.

Kenedy says he voted at Cleveland, "my place of business, and I considered it my residence. My family temporarily in Florence. The Hotel Company had eighteen hands at work; with one or two exceptions they were young men who made their homes wherever they were at work; one of the married men had made a claim before moving out. They all, I thought, had a right to vote, being long enough in the county. Acquainted with a majority of voters; thinks there were from thirty-five to forty legal voters at Cleveland precinct; full vote not cast."

J. M. Mentzer. He said: Went to Monroe county; settled in a tent near Cleveland; made a claim in July. Believes none but legal votes polled; is an editor.

A. B. Pattison was probate judge in Platte county; surveyed the town of Cleveland; thirty-five inhabitants in Cleveland precinct in August, 1857. There were twenty or twenty-five votes that I know of.

G. W. Stevens resided in Cleveland at the election in 1857. Knows of no illegal voting. Well acquainted with the inhabitants of Cleveland precinct; there were from thirty-five to forty voters in the precinct; the full vote was not polled at that election. H. H. Hill only voted once.

R. W. Steel. A company went out to Cleveland, some to work, and some to settle, about the 1st of July; among these persons who went out at this time, and talked of settling there, were the eight persons objected to by Mr. Selden as not being residents. Kenedy, Weech, Mentzer, and others went to Cleveland to settle permanently.

In reference to Monroe precinct the evidence for contestant is as follows:

John Reck. Of the names on the poll-list about seven persons resided in Monroe settlement.

Oliver Twist and Sam. Weller voted. One-third Mormon Americans.

Samuel Nichols visited the precinct after the election. Says: "I then went to Monroe precinct, about ten miles distant from Cleveland settlement, and stopped at the Monroe settlement. When the election was held for that precinct I asked and obtained permission of one of the judges of election, and of one of the clerks, to take a copy of the poll-list of said election. I found only five of the persons whose names are on the poll-list living in Monroe settlement. There were only two dwellings inhabited then; one was a sod shanty or house, the other a small log, temporary, shanty. From there I went to the Mormon settlement called Beaver, or Genoa, on Beaver creek, in Monroe settlement. I found there the leaders or principal men of the Mormon settlement or colony, viz: Messrs. Allen, Henry Peck, Nathan Davis, and Charles Cooper, who was one of the judges of election on the 3d day of August. I read over to them the names on the poll-list, and asked them to tell me each man whom they knew as I read over the names. I counted the number whom they stated that they knew, and the number was *forty-five*, which all or any of them knew.

asked them if they knew every one who lived in their settlement; they said they did. I then read over the names on the poll-list again, and asked them to name each man as I read over the names who lived in their settlement; they named *forty*. I counted them. I asked if they knew how many men living in their settlement voted at the last election. They said they did; that there were just *forty*. I asked for whom they generally voted. They said they all voted for Judge Ferguson.

Kenedy was acquainted with the Mormon settlement; thinks they were 120 voters; no Mormon trains about time of election; his opportunity of knowing is as good as Mr. Reck's; full vote not polled.

G. W. Stevens considerably acquainted in the Mormon precinct; thinks 100 or more voters.

H. T. Hudson, elder in the church of the Latter Day Saints, well acquainted in Monroe precinct; about 100 voters; told Chapman the election was not fair; thought so until he got better information. There was an eccentric individual generally known by the name of Samuel Weller, and I should not wonder if he voted under that name.

Charles H. Whaley, probate judge of Monroe, was pretty well acquainted; thinks there are about 100 voters in Monroe and Genoa; thinks the election fair; did not know of one illegal vote; voted for Chapman; challenged some of the voters.

W. F. Pierce, manager of election; pretty well acquainted; thinks there was no illegal voting.

R. P. Kimbal, clerk of election; pretty well acquainted; thinks the election perfectly fair; thinks there were more than 87 legal voters in the precinct then; the contest for county seat made each side vigilant in challenging votes.

Florence precinct.—Contestant's evidence.

T. Donovant said: "Mormon Tom voted four or five times;" heard one of the judges of election, between eight and nine o'clock p. m., say that 373 votes were polled.

E. Creighton was told by one of the judges of election, "about five o'clock or after," that 271 votes were polled.

The poll at Florence, at election in August, 1858, was 159.

Ferguson's evidence.

R. W. Steele, one of the managers of election, says not over "fifteen votes were polled after 6 o'clock." The negro sworn to by Donovant as voting offered to vote, but was rejected; does not believe Mormon Tom voted more than once; there was no Mormon train near at the time of election, and none such voted; knew all who voted, except those from Saratoga; there were about thirty of them; most of them voted for Thayer; some perhaps for Chapman; does not think any of them voted for Chapman; should not believe Donovant on oath; believes he swore falsely in a pre-emption claim; had that reputation.

Florence.

Dr. Malcomb. No Mormon train; all left before; no persons of such train voted.

The vote polled at Florence in the election August 2, 1858, was 159.

Dr. Harsh, manager of elections at Florence. Polls closed about 7; we waited for some voters to come in from prairie; "they were legal voters—about 15."

To oust the sitting member, it is necessary to throw out the Florence precinct. We have not felt at liberty to do this, for obvious reasons. We have deducted the fifteen votes polled after 6 o'clock. The result at which we arrive is, that the sitting member is elected by 34 majority. We reach this by the following process:

For Ferguson, as returned by canvassers	1,654	
Add votes not counted	5	
	1,659	
Deduct votes at Florence after 6	15	
Deduct Weller and Twist	2	
	17	
		1,642
Chapman, as returned by canvassers	1,597	
Add vote not counted	1	
Cumming City vote not counted	10	
		1,608
Majority for Ferguson		34

We therefore recommend the adoption of the following resolution, viz:

Resolved, That Fenner Ferguson is the legally elected delegate from the Territory of Nebraska.

W. W. BOYCE,
I. WASHBURN, JR.

The subjoined extracts from the brief debate on this case indicate its character:

Mr. WASHBURN, of Maine. The election in Nebraska was held on the 3d of August, 1857. Notice of contest was given within the time prescribed by the law of 1851. The answer was filed on the 3d October. The contestant, although the field is open for operation, does not serve his notice of testimony till November; and he then cites the sitting delegate to appear and take testimony on the 23d *and* 24th *of November*—within two weeks of the time when he was to take his seat on this floor, under the certificate that he held from the authorities of the Territory—although there had been forty or fifty days before that in which the testimony could have been taken had the contestant been disposed to give the sitting delegate a fair opportunity of being present and meeting that testimony.

But the contestant, after the sitting delegate had left the Territory on a visit to New York, and without an intention of returning until after the close of the first session of this Congress, caused a notice to be left in the house where Mr. Ferguson had formerly resided, but where he did not then live. One notice was left in the hands of a party who was there but transiently, and whose residence was some ten miles distant. Another notice was subsequently left at the same house, in the hands of the person residing in, and the tenant of, the house; but neither of these gentlemen, as appears by the affidavit of Mr. Ferguson, was his agent or attorney. And when one of them did offer to appear—inasmuch as the notice had been left at his house—and to cross-examine witnesses, the magistrate refused to permit him to do so, unless he could show that he had been authorized to appear by the sitting delegate; and so all cross-examination was precluded. A citizen of the Territory, whose case was on trial—for the people are interested in these election questions—was refused permission to examine the contestant's witnesses.

Mr. CLARK B. COCHRANE. I desire to know whether, before Mr. Ferguson left the Territory to come to Washington, he received personal notice that his election would be contested?

Mr. WASHBURN, of Maine. He had received notice of the contest. It is in evidence that while he was in Washington, on his way to New York, he here met the contestant, and told him that he was going to New York, and should not return home until after the first session of Congress. The contestant, therefore, knew that the sitting delegate was not in the Territory, and that notice left for him there would never reach him. The contestant might then have notified Judge Ferguson, or ascertained where he would have the notice left.

Mr. WILSON. I wish to ask the gentleman whether the notice of contest was not served within sixteen days after the election?

Mr. WASHBURN, of Maine. The answer to the notice of contest was dated on the 2d day of October; and on the 12th day of November, one month and ten days after the party might have proceeded to take testimony, he gave notice that he would do so on the 23d of November, within two weeks of the time when the sitting member was bound to be here. He might have taken that evidence before; and I submit whether he should not have done it if he desired to give fair play; for then the sitting member could have been present and had an opportunity of cross-examining witnesses.

Mr. MAYNARD. I wish to ask the gentleman from Maine whether, as matter of fact, without reference to the formality of the notice served, the testimony shows that the contestee received actual notice or not?

Mr. WASHBURN, of Maine. It appears from his affidavit that he knew nothing about it; and it was because of this fact that the House, at the last session, passed a resolution authorizing both of these parties to go home and take testimony; and I supposed, at the time, that the contestant would go home and give notice; and if he desired to bring this testimony here again, he would cause it to be taken over again, and give the sitting member an opportunity to be present at the caption.

Mr. Speaker, not only is all this testimony *ex parte*, but a great part of it is composed of mere affidavits; and most of that which was alluded to and commented on by the gentleman from Indiana was in the form of affidavits sworn to before a notary public, who, the gentleman himself says, has no right to administer an oath in the Territory of Nebraska. And, sir, there is not a single fact, upon which he relies for the material points in his case, but what is hearsay. There is not a single fact of importance touching the precincts of Florence and Monroe, but what comes from the declarations of third parties. There is not a scintilla of testimony here which is not of that character; whereas the rebutting testimony is that of witnesses who lived within the precinct, and who were sworn and cross-examined, and state facts within their personal knowledge. The testimony of the contestant is, as I have said, largely composed of mere affidavits; and such, under the law of 1851, cannot be received at all as

evidence, and no one has contended more strenuously than the gentleman from Indiana that this kind of testimony cannot safely be received. In the case of Campbell and Vallandigham last year, it was contended, on the part of Vallandigham, that the testimony of witnesses to the declarations of certain parties as to whom they voted for should be received. The majority of the committee, I believe, were of opinion that that testimony might be received, upon the ground that the declarations of men at the time they deposited their votes were a part of the *res gesta*, and must be received from the necessity of the case, as there might be no other way of proving how parties voted. But, sir, there is no such necessity or excuse for it in this case, not even in reference to the allegation made by one of the judges of the election as to how many votes were cast at the Florence precinct before a certain hour of the day, because he was a legal witness, and might have been examined; in fact he has been, I believe. The statement which he is reported to have made is mere hearsay, and not admissible upon any principle. And the same is true in regard to the declarations of Nichols, and somebody else, who went over from Omaha to Monroe, and made inquiry as to how the vote stood there, and how many votes had been received; and then came back and retailed, in the form of affidavits, the statements of others, upon which we are asked to unseat a member of this house.

I desire to call the attention of the House to the position which the gentleman from Indiana took last session; and bear in mind that this evidence, which he contended should not be received then, was the admission of a party, made at the time he voted, and was a part of the transaction. Says the gentleman from Indiana, in the case of Vallandigham *vs.* Campbell:

"Such is the evidence produced to prove that twelve negro votes were cast for the sitting member in Oxford township; such is the evidence on which we are called to decide the rights of a hundred thousand people. It is mere hearsay; it is no evidence. He does not state, of his own knowledge, any fact, or what means he had of knowing. He merely retails the loose statements of bitter partisans."

Mr. WASHBURN. Again, he says:

"Another witness testifies, in regard to a voter, that the father of the voter was a republican; that the family were republican; that the son voted; and of course it followed that his vote was cast for the sitting member. Is this satisfactory evidence to the legal gentlemen on the other side of the House? Is it evidence at all? Most certainly not."

And yet, sir, it is entirely upon evidence of this kind that the sitting member must be unseated, if that shall be the judgment of this house—nay, upon worse evidence; for the reason for admitting that does not apply in this case at all.

Mr. WILSON. I stand now by every word I said then, but the House decided otherwise; and I presume that at least the other side of the House will be bound by the rule which they established in that case.

More than that, there is a difference between that case and this. Here is a declaration made by a judge of the election, at the very time the election was proceeding; and it is very difficult for me to determine whether this is not part of the *res gesta*, and not hearsay evidence. But still, I put this case upon the broader ground that the fact that the polls were kept open contrary to law, from six until nine o'clock, vitiates the entire election.

Mr. WASHBURN, of Maine. If the gentleman has changed his opinion since last session. I have not. I maintain that hearsay evidence in all cases is unsafe, and ought not to be resorted to or relied upon. The gentleman from Indiana last session recited from the case of Archer *vs.* Allen, as follows:

"There is some testimony that certain persons said that they had heard another man say that he had voted for Mr. Allen, when he had no right to vote. But are we to disfranchise a congressional district of a hundred thousand inhabitants on hearsay testimony that would not be received in a magistrate's court when a shilling was in controversy?"—*App. to Cong. Globe, 1st sess. 34th Congress, vol. 33, p. 929.*

And again, in the same report:

"Next, as to Alfred Cowden, the only evidence is that he was heard to say that he had voted at the election; that he had voted for Allen; that his vote had elected him, &c.; and that he was not of age at the time. This evidence, the undersigned are clearly of opinion, is *hearsay evidence of the worst sort*. It is no evidence at all. It would not be received as evidence in any court, and it never should be received in cases of contested elections before this house; for, by the admissibility of such evidence, it would be the easiest matter in the world to set aside any close election, and defeat the will of the majority, by getting persons to *say* that they had voted illegally for the man whom, perhaps, they had used their greatest efforts to defeat. Falsehoods, where there is no solemnity of an oath, are often resorted to in elections in canvassing before the people against a candidate before an election, as all of us, perhaps, well know; and who that would tell a lie before an election, would not do the same thing after it, if he could thereby effect the same object?"

So, sir, in a case of this kind, where it is only contended that the testimony must be received from the necessity of the case, because there is no other way to get at the facts, if the doctrine is sound that the testimony cannot be received, much more is it true that there is no reason for its admission where the declarations, if made, were made in open meeting and must have been heard and known by others. It was a mere casual remark of a judge of election not made under oath. Sir, is it to be admitted here as safe ground for us to proceed

upon, that a man may be unseated in this house because a judge of elections may have falsely, perhaps corruptly, made a statement duriug the progress of an election in reference to it? Is that a ground upon which gentlemen can expect us to vote against the sitting member? Are our rights dependent on such slippery foundations as this?

Mr. CLARK B. COCHRANE. For the purpose of deciding my own vote, I would ask the gentleman whether these facts set forth in the report of the majority of the committee, the facts concerning the precincts of Florence, Monroe, and Cleveland, depend entirely upon *ex parte* evidence?

Mr. WASHBURN, of Maine. Entirely, and upon testimony taken, as I have stated, under notices left at what was called the last and usual abode of Judge Ferguson, at a house vacated by him before they were thus left and in the possession of another man.

Mr. BOYCE. In a case of this character, it seems to me that a sitting member should not be dispossessed of his seat upon doubtful testimony. The party contesting ought to make his case out clearly. Questions like this, too, ought to be decided according to justice and their merit, without paying too much attention to mere technicalities. Several technical points have been raised here and strenuously insisted on by the gentleman from Indiana, [Mr. Wilson.] It has been said that the managers of the election were not sworn in by the proper officers. Who swears them in? Notaries public. I am not clear that notaries public had not a good right to swear them in. What does the law say? That the managers shall be qualified by subscribing to the following oath, 'by any person authorized by law to administer oaths.' The question of notaries public administering oaths was not mooted in the Territory at the time of this election. Since then a decision has been made, in an attachment case, that a notary public cannot administer an oath necessary to institute the proceedings, and that their power to administer oaths is confined to commercial matters. I see no reason why a notary public could not swear in the managers of the election. It seems to me that any person who had a right to administer oaths could have sworn in these managers. The law required the managers to swear that they "would faithfully discharge the duty of inspectors of elections, according to law, and the best of their ability."

On motion of Mr. Cochrane, (February 10, 1859,) the House laid the whole subject upon the table—ayes 99, noes 93.

NOTE.—The debate upon this case will be found in vol. 38, part 1. For the report: Mr. Wilson, page 914; Mr. Gilmer, page 941. Against the report: Mr. Washburn, pages 916, 942; Mr. Boyce, page 919.

THIRTY-SIXTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. GILMER, North Carolina.
DAWES, Massachusetts.
CAMPBELL, Pennsylvania.
BOYCE, South Carolina.
MARSTON, New Hampshire.
Mr. STEVENSON, Kentucky.
GARTRELL, Georgia.
STRATTON, New Jersey.
MCKNIGHT, Pennsylvania.

HOWARD *vs.* COOPER, *of Michigan.*

The sitting member asked an extension of time to take testimony. The House refused.

Upon the main contest, where the law or the custom fixed the election at a certain place, and it was held at another, two miles distant, the committee rejected the vote.

The law requiring that the board of inspectors shall consist of *three* persons, and but two officiated, the vote was rejected.

Under the law of Michigan, to be entitled to vote, a man must have come into the State and township, or ward, with the intention of making it his permanent residence.

Gross irregularities and palpable violations of law in conducting an election in a ward should cause the exclusion of the entire poll.

IN THE HOUSE OF REPRESENTATIVES,

MARCH 15, 1860.

Mr. CAMPBELL, from the Committee of Elections, made the following report:

That they have considered an application made by the sitting member to them to ask of the House, in his behalf, leave to allow further testimony to be taken, pursuant to the proviso in the 9th section of the act of February 19, 1851. This being an application amounting to a continuance of the cause until a future day, it was deemed proper to settle it before deciding upon the merits of the case as presented in the issues, the allegations, and proofs of the respective parties.

Mr. Cooper presented this application on the 5th of March instant, more than *sixteen months* after the election was held, and more than *fourteen months* after notice of contest; more than thirteen months after his answer had been served upon the contestant; more than eleven months after the time for taking testimony under the law had expired, and after one-half of the time of the service of the Congress had elapsed; he never having previously examined any witness or taken any testimony in his own behalf, or given any notice of his intention or wish to do so. And yet it appears he was present by counsel more than eleven months before he made this application, at the taking of all the testimony in the case, and cross-examined every one of contestant's witnesses, but offered none of his own.

If this does not present a clear case of *laches* on the part of the sitting member, the committee are at a loss to know what conceivable state of facts would make one.

The memorial or application of the sitting member is accompanied by twenty-nine *ex parte* affidavits, (taken without notice to contestant,) and embraces two distinct requests, urging that one or the other be granted, viz:

First. That the affidavits be received as evidence in the cause, and made part of it; or, if this cannot be done, then—

Secondly. That such time be granted as will enable the sitting member to take the necessary steps to secure the testimony of the witnesses embraced in the affidavits. The contestant resisted this application, and read and filed an argument with the committee. The memorial, the said affidavits, and the arguments are herewith submitted.

In support of the application, the sitting member seems to rely mainly on the fact that the testimony in the cause was taken during the last part of the time allowed by law for examining witnesses. But the act of Congress referred to provides for taking testimony by both parties at the same time, by requiring the notice of contest and answer to state fully the grounds upon which the parties rely, and also that ten days' notice of the time and place of taking testimony, and the names of all witnesses, besides authorizing both parties to appear by agent or in person, as they may see proper.

In the case of Vallandigham *vs.* Campbell the committee said, (and they were sustained by the vote of the House,) "*However extensive the time covered by one party in proposing to take testimony, it in nowise precludes the opposite party from proceeding at the same time to take it in his own behalf.*"

In that case testimony had been taken the very last day by the contestant, and his notices not only covered almost all the time allowed by law, but he had so laid them one upon another as to employ "*the full period of sixty-six days.*" In the case now under consideration only twenty-two days of the sixty allowed by law were consumed by contestant for all his notices and the taking of his testimony. The sitting member could have had the exclusive use of thirty-eight of the sixty days, and he was in no way "*precluded*" from proceeding to take testimony in his own behalf during the other twenty-two days covered by the

operations of contestant. The committee regard much that is stated in the sub-joined affidavits as irrelevant and immaterial. If they were legal testimony, they are not aware that they contain any newly discovered evidence, or one single fact that could not, with ordinary diligence, have been as fully and as easily proven in March, 1859, as in March or April, 1860.

In the case above referred to of Vallandigham *vs.* Campbell the committee express the "*opinion that if either party to a case of contested election should desire further time, and Congress should not be then in session, he should give notice to the opposite party, and proceed in taking testimony, and preserve the same, and ask that it be received, and, upon good reason being shown, it doubtless would be allowed; but it seems too much to grant in this case, for either of the reasons stated.*"

This report, as already stated, received the sanction of the House. In the case now under consideration there was not only no attempt to take any testimony during the time fixed by law, and none after its expiration and before the meeting of Congress, but this application is not made until some weeks after the organization of the House. To grant such postponements and protracted appointments for taking additional testimony, after the meeting of Congress, and after both parties have had *equal* and *sufficient opportunity* to present their full case, is practically to *nullify the law*, to render the right of contesting a seat in Congress *useless and nugatory*. If such application rests upon no stronger reason than the laches of the party making the same, it should be promptly rejected. To do otherwise is to disregard the rights of parties and constituents, to trifle with the privileges of the House, and to make the labors of your committee interminable and useless. It is due to every interest concerned that the rights in dispute should be settled and parties held to reasonable diligence, under the laws of the land, in the prosecution and presentation of their respective claims.

Your committee are therefore of opinion that no further time should be allowed to take supplemental testimony in the case. At the request, however, of the sitting member, in order that the question may be presented to the House, your committee report the following resolution:

Resolved, That it is inexpedient to allow further time to take testimony in the case of William A. Howard, contesting the right of Hon. George B. Cooper to represent the first congressional district of Michigan in this house, as asked for by the sitting member.

The extracts which follow are from the debate in the House upon the preliminary question:

Mr. STEVENSON. This case presents the point not presented in any of the cases which have hitherto occurred here and are referred to as authority. The application of the sitting member is not to take testimony on the merits of his case. That it was his duty to do within the sixty days. He is willing to stand on this testimony of the contestant if you will expurgate the false testimony or allow time to rebut it. All he asks is an opportunity to show that Edgar and one other witness are unworthy of belief. If you will allow him this privilege he is willing to stand upon the testimony as taken. Where is there a case on record where such a privilege was refused? The gentleman from Pennsylvania cites me to the case of Newland *vs.* Graham, in which Hon. Lynn Boyd presented his report against a similar application. That case occurred before the act of 1851 was passed; yet the gentleman based his opening argument upon the fact that these parties had commenced proceedings under the act of 1851, and he is for holding them to it. The logical sequence of his argument is, that as the case cited occurred long before the passage of the act of 1851, it cannot become authority in its construction. Instances of this indulgence asked for here are frequent. Against the precedent I might cite Vallandigham *vs.* Campbell, the Nebraska case of Chapman *vs.* Ferguson, during the same Congress, where time was given for the taking of further testimony upon much slighter grounds than those presented in this application.

* * * * * Has the sitting member been guilty of any laches? I say that he has not. If any delay has occurred it is attributable to the contestant, who ought not to be permitted to avail himself of his own wrong. I will not impute any improper motives to the contestant

for the late day fixed for his testimony, but I will say it should not work injustice against popular rights. Is it not a remarkable fact that a seat should be desired on this floor upon the testimony of a witness who is proved so clearly by the affidavits in this record to be unworthy of belief, under indictment for felony, and his testimony taken at a period so late as not to be rebutted? Is it not still more remarkable that the sitting member, with this evidence of Edgar's character, should be denied the privilege of impeaching by the popular branch of the American Congress?

On yesterday time was given Williamson in his contest with Sickles, although not a requisite had been complied with, and to-day similar indulgence is to be refused because he had not taken testimony which he could not read, and has not pursued a greater diligence than is required by the holder of protested commercial paper. The gentleman from Massachusetts [Mr. Dawes] said yesterday, in favor of giving time:

"Has he failed to understand that we put this case upon the fact that it was impossible for the contestant to obtain process of court? Does he not understand, at this late day, that we put this case upon the ground that the contestant understood, and his counsel understood and believed, and lawyers to this day believe, that they could not be brought within that statute?"

He could not get legal process? Neither could Mr. Cooper. If that position was true yesterday, it is equally so to-day. There is another point in this case which the majority of the committee seem to have overlooked. The statute of 1851 requires that subpœnas shall be issued five days before the day fixed for taking testimony, and shall be returned with the depositions. These notices of contestant were served on the 11th and 16th, for the 21st and 26th. If the sitting member had desired to impeach any of this testimony, he could not have coerced the attendance of witnesses, as five days would not have elapsed after the taking of such testimony and the 26th March, when the time expired. Cooper could have gotten out no process to rebut testimony taken on the 22d, 23d, 24th, 25th, or 26th, even if Howard had waived notice.

Mr. WILSON. * * * * * Now, sir, I have said a great deal more upon this subject than I intended, but it is only preliminary to a statement of my position upon this case. I would not grant any time for the taking of testimony to a party who stated his own case so vaguely as not to entitle him to an investigation. This, I think, is the case with the contestant. I will give some of the specifications in his notice: "That at the election in November sundry ballots were cast." Again: "Sundry ballots were counted by the judges." Again: "Sundry persons were permitted." Again: "Sundry persons were refused to vote for him," &c. Now, surely no legislative body should institute an inquiry upon such allegations as these. If the names of the voters had been given, it would have been incumbent upon the gentleman from Michigan, the sitting member, to take testimony to prove that they were legal voters.

If the application were now made by the contestant to take further evidence, I certainly would not feel disposed to grant it: because I should consider that his notice was so vague and indefinite that no evidence ought to be allowed to be taken under it.

I do not mean to say that this objection applies to all the specifications in the notice, because four or five of them may have been reasonably certain; though even in the case where I think there is a reasonable minuteness of specification, the ground of objection to them is that they are insufficient in point of law; as where he alleges, for instance, that the inspectors of election in some cases were not sworn, which could hardly be a ground for throwing out the votes received by them.

I felt myself constrained to vote yesterday against the application of the contestant for the city of New York; because, admitting the general correctness of everything stated in his notice of contest, I would not have gone into any inquiry at all, because the complaint was altogether too vague and indefinite. It was a charge to which the sitting member might properly have demurred. Now, while I would not and could not grant time to the gentleman from Michigan to take evidence to contest the seat of the sitting member, the House will readily see that, after such evidence has been taken, after the Committee of Elections has gone on to consider such evidence, and held it proper to be received under the notice of contest, it becomes a question whether the sitting member shall take further evidence, which, if he were the contestant, I would refuse him, but which cannot be refused the sitting member unless the House is ready to say—and I presume they are not ready to say so—that they would exclude all the evidence taken under this notice.

As he has not had an opportunity to furnish such evidence, I say I would vote to give him time; and that, too, without the slightest inconsistency between my vote yesterday and my vote to-day. I refused to vote for time yesterday to one petitioner. I should refuse to-day to vote for time to the other petitioner. I would not allow a man to take advantage of his own wrong. I would not allow a petitioner to give a vague, indefinite notice of contest, and to make that an occasion for desiring further time to take evidence.

Mr. CAMPBELL. Will the gentleman from Virginia allow me a moment? He is laboring under a mistake. The committee has not decided on the testimony submitted by the parties. This is a mere preliminary motion. Whether the evidence will be received or rejected depends on future action. We have not yet decided whether there is any competent evidence; or [illegible] 's all competent. We have had no action yet.

Mr. COOPER here made a remark which was inaudible at the reporter's desk.

Mr. MILLSON. It may be true, Mr. Speaker, that the committee has not yet come to any conclusion as to the character of the evidence; but the very failure of the committee to report back the petition of the contestant, with the request to be discharged from the further consideration of the subject, shows that they are entertaining it. Why report this preliminary resolution against taking further evidence? If they regarded the evidence of the petitioner as insufficient to found a claim upon, why have they not reported that fact to the House, and asked to be discharged from the further consideration of the subject? I infer, therefore, from the circumstances, that they have made no such report, and have not asked to be discharged; that they are proceeding to consider this question as a pending question, founded on that notice; and therefore I will not by my vote deprive the sitting member of the opportunity of collecting such testimony as he may be able to produce in answer to the complaint of the petitioner; because, although I might not deem it necessary that he should take any evidence at all, yet I have no right to substitute my individual impression as to what should be done, for the deliberate judgment of this whole body.

Now, sir, I think there is a very strong case made out for the indulgence asked for. The sitting member states that he desires to confute and contradict certain statements made by one witness in particular, whose name has been referred to as a Mr. Edgar; and it has been asked why he did not impeach that man on the reception of the notice that his evidence would be taken? That question was very fully and conclusively answered by the gentleman from Kentucky, [Mr. Stevenson;] but I desire to make an additional answer. It is, that I never heard of any proceeding to impeach the veracity of a person on the mere reception of a notice from some party to a controversy that that person would be examined as a witness. And I do not think I hazard much, as a lawyer, in saying that any man who should venture to take testimony impugning the character of a citizen as unworthy of credit, in a case in which he had never been sworn as a witness—in a case where, perhaps, the person himself might never choose to be sworn as a witness—would perhaps expose himself to an action for slander or libel, as the calumny may have been oral or written.

In this case, Edgar might never have chosen to go forward as a witness. What right had Cooper, the sitting member, to conclude that because the contestant, Mr. Howard, gave him notice that Edgar would be a witness, therefore Edgar would indeed be a witness; that he would consent to be a witness; and that, as such witness, he would commit perjury? It might have been that Edgar, from his own knowledge of his bad reputation, might have refused to subject himself to examination; and it would be altogether premature in the other party to take evidence to confute the probable or anticipated statements, or to blacken the character of one who was a mere possible witness, and who never had been examined in the course of any judicial investigation.

Mr. CAMPBELL. In the case of Vallandigham *vs.* Campbell, immediately after the contestant had closed his evidence on the last day allowed by the act of Congress for taking it, Mr. Campbell gave the gentleman from Ohio notice that he would proceed to take the evidence of witnesses to contradict the testimony which the contestant had submitted, and the honorable gentleman denied him that right, refused to pay attention to the notice, and told him that he might go on and indulge himself in that little pleasantry, if he saw proper, but that it would not be competent evidence. The minority of the committee in that case thought that the sitting member had used all diligence; that immediately, as soon as the evidence of the contestant was brought to his notice, he had shown a desire to go on and take testimony to contradict it, and that he ought to be allowed to take further proofs. But the majority of the committee overruled them, and this house sustained the majority.

* * * In summing up the argument upon the one side and the other, let me call the attention of the House to a broad rule which should govern them in all these cases, and which, as long as I am a member of the Committee of Elections, I hope to recognize for my government before that committee. That rule is this: that wherever a party comes within the plain terms or meaning and spirit of the act of 1851, he should be governed by its provisions. He must show a strong case, indeed, to authorize this house to take his case out of the wholesome enactments of that law. But where the contestant has not been brought within the provisions of that act, then it is for this house, at its discretion, to grant further time or not, as to the House may seem proper. It was acting upon that rule that the majority of the committee agreed to give Mr. Williamson further time, and it is acting upon that same rule that they have refused to give Mr. Cooper further time, Mr. Williamson's case being *outside* of the act, and Mr. Cooper's *within it*, as is admitted by every member upon this floor. But the distinguished gentleman from Virginia [Mr. Millson] makes the point that it was necessary for the contestant to give notice of the names of the witnesses, and that the sitting member could not impeach the veracity of a witness until he knew what that witness would testify to.

Mr. Speaker, there is no such rule of law governing any of our courts or any of the tribunals of the country. The opposite party, in all proceedings in a court of justice, is not even entitled to know the names of the witnesses subpœnaed on the other side. This is the general practice; there may be exceptions to it. I have not now in my recollection any court by the rules of which it is necessary to give the opposite party notice of the names of the witnesses to be introduced on the trial; and I never heard of a rule of practice which

would enable one party to move for a continuance, to afford an opportunity of impeaching the veracity of the witnesses called on the other side. But I wish to refer the gentleman to the act of Congress of 1851 in this particular. The act of Congress provides that ten days' notice shall be given of the names of witnesses whom it is intended to examine in the case. What was that wholesome provision put in that law for? Why, to enable the opposite party to bring testimony to impeach the testimony of such witnesses of their veracity; and, in requiring that notice, the act of 1851 goes, in its equitable spirit, beyond the practice of the courts.

I refer the gentleman from Virginia to the fact that the sitting member had notice, ten days previous to the examination of Edgar, that he would be called as a witness in the case, and had ample opportunity to impeach his veracity if he saw proper to do so. The fact that he did not impeach him shows that he considered him at the time a responsible and worthy witness, and one that could not be successfully impeached, or that his testimony was deemed unimportant. But my colleague on the committee, the distinguished gentleman from Kentucky, [Mr. Stevenson,] says, we propose forcing through a case of this kind on the evidence of a *felon*. Why, Mr. Speaker, there is not a spark of evidence in this case going to show that this Mr. Edgar is not as worthy and responsible a citizen of Michigan as any witness examined in the case.

The gentleman from Kentucky calls my attention to certain *ex parte* affidavits produced by the sitting member for the consideration of the Committee of Elections, sworn to at the eleventh hour; *ex parte* statements taken without notice to Mr. Howard, without notice to the witness Edgar, and without giving him an opportunity to be heard in his own defence; the interested and biased statements of mere partisans. Sir, there is a principle of law—as salutary in practice as just in theory—that the law presumes every man is innocent until the contrary appears from competent evidence. Does my colleague on the committee suppose that I would strike down the character of any man on a mere *ex parte* affidavit? Is my colleague or any man here entitled to brand Edgar as a felon until the crime shall have been proved against him to the satisfaction of a jury of his country? Does my colleague suppose I would brand him with infamy without a hearing? No, sir. I will give the affidavit which is produced just the weight to which it is entitled as an *ex parte* statement—the weight the law gives it; and that is no weight at all. If it be true that the evidence of Edgar is unworthy of credence, it was the place of the sitting member to have shown it at the time he was examined, or at least to have used a little more diligence in bringing the matter before the House.

The House adopted the resolution reported by the committee declaring it "inexpedient to extend the time," &c, &c., by yeas 89, nays 79.

APRIL 19, 1860.

Mr. GILMER, from the Committee of Elections, made the following report:

The first district of Michigan is composed of the four counties of Jackson, Livingston, Washtenaw, and Wayne. The election here contested was held on the 2d day of November, 1858. The whole number of votes cast for representative at this election was 26,189;

Of which there was returned as given for George B. Cooper, the sitting member	13,123
For William A. Howard, the contestant	13,048
Scattering	18
	26,189

Plurality for sitting member, 75 votes, as appears by the returns made to the office of secretary of state of Michigan.

The certificate of election was issued to the sitting member on the 30th of November, 1858. The notice of contest, the answer of sitting member, and the taking of testimony in the case, were in accordance with, and by the authority of, the act of Congress of the 19th of February, 1851.

Upon the testimony so taken, the committee proceeded to hear and determine the case; the amplest opportunity for argument and investigation being allowed to both parties in person, and, so far as they desired, by counsel.

The contestant seeks to overcome and destroy the apparent majority of the sitting member upon several distinct and independent grounds, either of which, if proved, he insists establishes his right to the seat.

The returned member interposed a motion to strike out all the testimony taken by the contestant, for certain alleged informalities and irregularities claimed to appear upon the face of the record. Both parties were fully heard upon this motion, and your committee are of opinion that no part of the record is irregular, and that it should stand and be considered.

The undersigned proceed to consider the points insisted upon by the contestant in this order:

First. It is insisted that the votes returned for both parties from the 4th ward in the city of Detroit must be deducted from the whole number of votes returned for them, respectively, in the district, for reason of such irregularities and informalities, such clear violations of the statutes of Michigan, and such errors of substance, as to destroy all certainty as to the accuracy of the result, and to make it impossible under the law to give any legal effect to the ballots purporting to have been cast in said ward.

Your committee have carefully considered the evidence upon this branch of the case; and while they would be very unwilling to reject any poll upon mere technicalities, yet, in this case, in the judgment of your committee, the violations of the law were so palpable, and so relate to matters of substance, and produce such uncertainty as to the ballots, (*vide* Tillman and Wells's testimony,) that your committee, upon due deliberation, have rejected the poll, and deducted the votes returned for each of the parties in said ward.

Second. It is alleged that the votes returned from the second ward in the city of Detroit should be deducted, for the reason that the polls were in the possession of rioters and prize-fighters throughout the day; and that the obstruction and violence were such as to prevent the legal electors from voting, and so facilitated illegal voting, on the part of those who had no right to vote at all, that the whole poll ought to be rejected.

It seems to be admitted that the board was legally organized in the morning; and while it is shown by four witnesses (*vide* Larned, Jackson, Stebbins, and Hornbeck's testimony) that disorders and obstructions were great, attended by intimidation and violence, it may be difficult to determine what precise amount of disorder, obstruction, and even violence among bystanders adjacent to the polls should be deemed sufficient to vitiate the election. In the present instance, if the view your committee take of the other branches of the case be correct, the discussion of this question may not be very material. Be this as it may, your committee recommend that the poll stand. If the state of facts proved leave it doubtful whether, on the whole, the poll should be retained or rejected, your committee are of opinion that they will best avoid the establishment of bad precedents by giving effect to the returns in all cases of doubt.

Third. It is insisted by contestant that the vote of the township of "Grosse Pointe" cannot be counted, for the reason that the polls were opened and the election held at a place two miles distant from the place fixed for holding the election by a vote of the town in town meeting.

The election was held at the house of one Charles Wilson. It is claimed by contestant that it was regularly appointed to be held at the house of one Michael Kline, two miles distant. It seems to be admitted by both parties that if it was so appointed by the competent authority, and changed without competent authority, it is fatal, and the vote cannot be counted. Section 508 of the 1st volume of Michigan Compiled Laws requires that "the annual and special township meetings shall severally be held at the place in the township where the last township meeting was held, or at such other place therein as shall have been ordered at a previous meeting."

It is clearly proved that this election was, at the annual meeting, ordered to be held at the house of "Michael Kline." If this section of the statute applies to this election there is an end of the question, and the vote must be deducted.

The returned member makes a distinction between the election in question and all "annual and special township meetings," and claims that this section does not apply to this election. In the judgment of your committee it is immaterial whether the section apply to this election or not; for if it do not apply, then the statute is everywhere silent on the subject of determining the place where the November election shall be held. But the proof is clear that it is the general custom in that township for the electors to fix by vote at their annual meeting the place of holding the elections in November. The proof is equally clear that they did so fix it in this particular case. They having so fixed it in accordance with the custom, it could not be changed by any inferior authority, since neither custom nor law sanction any change by any individual or any board known to the law. The fact is proved that it was fixed at Kline's by the electors by vote in the annual meeting, and in accordance with the general custom, and in the absence of all law forbidding it, even if the 508th section does not apply. If the 508th section does apply, then the custom, the fact, and the law concur to make Kline's the legal place. Either way the vote, in the judgment of your committee, must be rejected.

Fourth. Your committee have rejected the vote of the township of Van Buren. The law requires that the board of inspectors shall be constituted of three persons in number. The proof is clear that there were but two. And as there was no board of inspectors known to the law, your committee see no way by which any legal effect can be given to the returned vote. They have, therefore, deducted it, although it can in no way affect the decision of this case, whether it be deducted or retained.

Fifth.—*Illegal and fraudulent votes.*—Your committee have been constrained to deduct a larger number of illegal and fraudulent votes cast for the sitting member than all his returned majority. Under this head they have deducted in all, from the returned vote of the sitting member, one hundred and six (106) votes, as being not only illegal, but many of them grossly fraudulent. Some of them were the result of a deliberate purpose to cheat and defraud. It is, however, due to the sitting member to say that it does not appear that he had personal knowledge of it at the time, or is in any respect personally compromised thereby. Of the illegal and fraudulent votes rejected by your committee, there were cast in the 2d ward of the city of Detroit at least fifty-eight (58) votes, and the testimony tends strongly to show that there were sixty-two (62.) In regard to the fifty-eight votes your committee think there is no doubt. These votes were cast in purpose of a deliberate design or conspiracy to defraud. Your committee, therefore, deduct fraudulent votes cast for sitting member as follows, viz:

	Votes
Second ward, city of Detroit	58
Fifth ward, " "	14
Seventh ward, " "	1
Eighth ward, " "	2
Grosse Pointe township	2
Van Buren township at least four votes, while the proof very strongly inclines to 10 votes	4
To which your committee have added 25 votes for the number of Canadians brought into the fifth ward of the city of Detroit by Orvis, Stowell, and Smith. As the number is said to be 25 or 30, your committee deduct the smallest number stated	25
Whole number	106

A detailed statement of the fraudulent votes so deducted by your committee will be found appended to this report.

Upon a review and summary of the whole case your committee find the following result:

The whole number of votes returned for contestant		13,048
Deduct votes returned from 4th ward	230	
Deduct votes returned from Grosse Pointe	27	
Deduct votes returned from Van Buren	104	
		361
Leaving votes for contestant		12,687
The whole number of votes returned for sitting member		13,123
Deduct votes returned from 4th ward	492	
Deduct votes returned from Grosse Pointe	189	
Deduct votes returned from Van Buren	163	
Illegal and fraudulent votes	106	
		950
Whole number of votes for sitting member		12,173
Majority for contestant		514

Your committee therefore submit the following resolutions and recommend that the same be adopted by this house:

Resolved, That George B. Cooper is not entitled to a seat in the 36th Congress as the representative from the first congressional district of Michigan.

Resolved, That William A. Howard is entitled to a seat in the 36th Congress as the representative from the first congressional district of Michigan.

It is necessary to recur to the debate in the House to gain a clear idea of all the legal questions in dispute. The more important are alluded to in the appended extracts:

Mr. DAWES: The resolutions offered by the committee, which are that the contestant is entitled to the seat now occupied by the sitting member, are based upon four propositions, either of which is sufficient, if found to be correct, to give the seat to the contestant. They are: First, illegal votes. The committee found illegal votes sufficient to more than counterbalance the majority of the official canvass for the sitting member. That is one ground. Another ground is a total departure from the requisitions of the law of the State of Michigan, in the manner of holding the election in one of the wards of the city of Detroit and in one of the townships. The third ground is, that the election in one of the townships was held in a different place from that in which it was appointed to be held; and the fourth is, that there were no proper officers in one of the wards in the city of Detroit. In point of fact, there are but three grounds upon which these reports are based; two of these grounds being properly included in one.

I call attention, in the first place, to the first ground of contest upon which these resolutions are based—and that is, the challenge of illegal votes. The committee found something over one hundred votes, cast for the sitting member, to have been cast by persons not authorized by law to vote at that election. Those one hundred and more votes are divided into four classes; one class embraces fifty-eight of these votes, another nine, another four, and another twenty-five, and there are some others. The fifty-eight votes all depend upon a single fact. They were cast in the second ward of the city of Detroit. That ward, the one in which the contestant resides, was not large, and the voters of the ward are all known to be inhabitants of the ward. Although there was great disturbance at the polls during the whole of the day, and it is known that many of the political friends of the contestant were kept away from the polls, yet there was found, when the polls closed, to have been a large increase of voters in that ward, something over one hundred more votes, I think, than were ever cast before; and upon the poll-list there appeared the names of about that number of voters never known to the oldest inhabitants of the ward before.

From these circumstances the contestant and the committee were led to direct their examination to that ward for the purpose of investigating the character of votes there given. It appeared that one Thomas Howrigan, a naturalized Irishman, residing in this ward, just before the election took a contract with the political managers of his party to carry this ward for the Democratic party, in consideration of a price. The ward gave usually twenty-five or thirty majority for the party of the contestant. On this occasion, as I have said, this Thomas Howrigan entered into a contract with those who were to have the offices to dispose of if the city election should be carried for the Democratic party. In that event he was to have a certain office, provided he carried the second ward for the Democrats. In pursuance of this contract he went to work.

The constitution and laws of Michigan required that, in order to be a qualified voter in that State, there must be a residence of three months within the State, and of ten days before the election within the township or ward where the vote is cast. This man Howrigan, in pursuance of his contract, went out and engaged sixty-two persons to come into the ward on the express stipulation that they should board with him for the ten days previous to the election, and have their board and grog free, on the consideration that they should vote the Democratic ticket when the election came. There were sixty-two of those persons, according to his own testimony. He was instructed, he says in his testimony, in what constituted the qualifications of a voter in that ward. He was instructed, he says, by the constitution of Michigan and the laws of that State, that ten days' residence made a voter. And he decided that if a man resided in the ward for the term of ten days, as he says, that constituted him a legal voter of the ward, and he came to the conclusion that staying in the ward was equivalent to residing in the ward.

But although these sixty-two men were brought into the ward just ten days before the election, yet in reference to some of them there was an interregnum in their ten days' residence before the election took place; for in staying with him under their contract, and having nothing to do but to eat his bread and drink his grog, they got up a prize fight, and went out into Canada to settle it; and in settling it, a portion of them got into jail in Canada on the Friday previous to the election, and remained there till Monday, when the political friends of Mr. Howrigan went over there and bailed them out; so that, I say, there was a a slight interregnum in the ten days' residence of a portion, though not applicable to the whole sixty-two, however. According to the law, even as laid down by this man Howrigan, the right to vote of those who were lodged in jail was somewhat invalidated.

The committee came to the conclusion that, in order to be a resident of the second ward of the city of Detroit—such a residence as would entitle a man to cast his vote there—he must come there for some other purpose than that for which these men came; that, under the law of the State of Michigan, he must have made his home in the second ward; he must not only have changed his residence to that place, but he must have gone there with the intention of making it his permanent residence, or his residence for an indefinite time; in the language of the law, "without any present intention of removing." Yet it appears, from the testimony in this case, that these persons came there without bag or baggage, without employment, and without any other purpose than to remain there for ten days previous to the election in order to vote, in pursuance of their contract, the Democratic ticket; and that immediately after the election they left, and have not been seen there since. Fifty-eight votes were rejected from the poll of the sitting member cast for him in this ward by these men. The evidence appeared clear to the committee that these parties, or numbers of them, came from Canada, not being even citizens of the United States, but coming from Canada directly to this second ward, having their board paid by this man Howrigan, in pursuance of their contract, and voting the Democratic ticket. Some of them were picked up in other parts of the city by him, and kept in the ward for ten days, for the purpose of voting; and having voted the Democratic ticket, left.

Mr. DAWES proceeded to argue in reference to the "Grosse Pointe" township vote, concluding as follows:

There was one other point. At one of the wards in the city of Detroit the election was not conducted in such a manner as to make it possible to ascertain, after the polls were closed, whether the vote was honestly taken or not. There were two tickets—one for city officers, and the other for the State ticket and representatives in Congress. They were both put into the one box. A voter walked up with two tickets folded up, and put them into the box. There was no poll list so kept that it could be ascertained whether the two tickets which the voter deposited were one for the State officers and one for the city officers, or whether both were not for the State officers or both for the city officers. There was nothing in the mode of keeping the polls to prevent frauds from being committed in that way; and when the polls were closed, it appeared that there was some variation in the votes. The committee, therefore, thought that this irregularity was of such a character as to render it impossible to say how many *bona fide* votes were cast at that ward for representative in Congress.

In the town of Van Buren, in that county, there were but two inspectors of election, although the law requires three. The town clerk is *ex officio* one of the inspectors of election.

In that township the town clerk was not present during any part of the day, except to cast his vote and go away. The law requires that, in the absence of any one of the inspectors appointed, one or more shall be chosen from the bystanders to take his place, who shall continue to act as inspector. The town clerk is also required to be one of the clerks of election to record the votes. The majority cast for the sitting member at that poll was greater than the whole majority returned for him; and therefore, if it be rejected, the resolutions based upon this point alone should be sustained.

Mr. GARTRELL:

* * * * * * *

Now, Mr. Speaker, what are the points presented here? There are but three. It is first maintained that the election in the fourth ward of the city of Detroit was irregular and illegal, and that the entire poll ought to be excluded. Four reasons are given by the contestant, and are more specially assigned by the majority of the committee in their report, why this entire poll should be excluded from the canvass.

First, because one of the inspectors, by the name of Dudgeon, is said not to have been sworn.

Secondly, because it is alleged that the poll lists were not sealed up in a box, as the laws of Michigan require.

The laws of Michigan require that the poll-box shall be locked and sealed. But, sir, it will be impossible for gentlemen to arrive at a just conclusion upon this branch of the case, which is a controlling one, without reference being had, closely and carefully, not only to the laws of that State and the laws regulating elections, but to the evidence in the case.

Let us, then, very briefly—as briefly as the justice of the case will allow—consider this law, and then invite the attention of the House to the evidence, although it may be disagreeable and monotonous. Then I shall expect the gentlemen on the other side, who are the political friends of the contestant, to disprove the facts presented, and refute the testimony in the case, or agree to the resolutions reported by the minority of the committee.

What is the law? Upon this point I find in the volume before me the law of the State of Michigan applying to this case, as follows:

"SEC. 42. At the general election, the supervisor, the justice of the peace, not holding the office of supervisor, whose term of office will first expire, and the township clerk of each township, and the assessor and alderman of each ward in a city, or if in any city there be not an assessor in every ward, then the two aldermen of each ward ***shall be inspectors of election, two of whom shall constitute a quorum.***

"SEC. 43. In case three of such inspectors shall not attend at the opening of the polls, ***or shall not remain in attendance during the election***, the electors present may choose ***viva voce*** such number of such electors as, with the inspector or inspectors, shall constitute a board of three in number; and such electors so chosen ***shall be inspectors of the election during the continuance thereof.***"

It will be observed that, according to these provisions, there may be three inspectors of election, including the alderman, in each ward in a city; and that in the townships the inspectors will constitute ***ex officio*** inspectors of elections. When present, it was their duty, their privilege, and their right to act in that capacity. It will be further noticed that being absent, or when present and refusing to act, the electors present may choose from their number inspectors to act in their places Two only are necessary to constitute a quorum sufficient to canvass the votes and determine the validity of the election.

* * * We come now to the second propositon: to exclude the Grosse Pointe election, a township near the city of Detroit, and in the county of Wayne. At the election in that township, there were polled for George B. Cooper 189 votes, and for William A. Howard 27 votes. This is another democratic majority, and that fact may account for its being so bitterly attacked. What are the reasons assigned for the exclusion of this entire poll, and the disfranchisement of over two hundred persons? When stated, they will be at once discovered to be exceedingly significant and remarkable. Say our friends of the majority of the committee, the reason for excluding this poll is because the place of election was held at Wilson's instead of Kline's; that it was changed from the regular place to a place two miles distant, and in violation of law; and that, therefore, no legal election was held. The majority assume that, although the election was held in the township where the law of Michigan provides it shall be held, yet is an illegal election; and, as it is an easy way of giving the contestant the seat, we will throw out the whole poll, and he will come in, as a matter of course. What are the reasons assigned for this extraordinary assumption of power? They say that, according to the laws of Michigan regulating township affairs, this election for Grosse Pointe was fixed to be held at Kline's. It is alleged that there was an arrangement between Kline and Wilson, the latter paying the former five dollars, by which the election was to be held at Wilson's tavern. There is no evidence of the fact that there was any such payment. It is upon evidence outside of the record that the majority would seem to proceed—mere heresay, and nothing more. We are told that this man heard another tell, or that he was told, and so on, that some understanding, some agreement, was entered into by Kline and Wilson.

Now, with regard to the allegation of the majority that the election at Grosse Pointe was in violation of the statutes of Michigan, I desire to remark that it requires but little ingenuity to convince any candid man, whether a lawyer or not, beyond the shadow of a doubt, of its fallacy; and that no court, nor any twelve sworn men in this country, could fail to conclude that the statutes relied upon by the majority do not apply; and that the law of Michigan is as clear as the noonday sun that the clerks of the several townships at these general elections should give notice of the time and place of each election, which it is admitted was done in this case.

What are these laws? I have them here before me. At page 228 of the compiled laws of Michigan, under the heading of "township meetings," the following provision is found:

"The annual meeting of each township shall be held on the first Monday of April in each year; and at such meeting there shall be an election for the following officers: one supervisor, one township clerk, one treasurer, one school inspector, two directors of the poor, two assessors, (if the qualified electors present at the opening of the meeting shall so determine by vote,) one commissioner of highways, so many justices of the peace as there are by law to be elected in the township, and so many constables as shall be ordered by the meeting, not exceeding four in number," &c.

It will be observed that these meetings are to be held annually, on the first Monday of April. The law goes on:

"The annual and special township meetings shall severally be held at the place in the township where the last annual township meeting was held, or at such other place therein as shall have been ordered at a previous meeting; and when there has been no such previous meeting, at such place as shall be directed in the act or proceedings by which the township was organized, unless it shall in either case become inconvenient to do so," &c.

And yet being by the statute of Michigan confined to that particular purpose; being held down to the management of town affairs, the election of their township officers; being a body corporate, authorized to sue and be sued, to raise money for the support of the poor, we are gravely told, and by legal gentlemen at that, that this statute applies to general elections held throughout the entire State of Michigan. I venture the assertion that such a construction and such an assumption were never before presented by a legal mind.

I might, Mr. Speaker, stop here, and there would be an end to all that objection; but I go further, and now propose to show, beyond the shadow of a doubt, that there are general election laws in the State of Michigan which apply to this case; and that those laws were, in their letter and spirit, carried out in the change of place of voting from Kline's to Wilson's. If I do that, there is the end of this objection. At page 102, in this same volume, I find the following statute, approved June 27, 1851, to take effect September 27, 1851:

"SEC. 1. The people of the State of Michigan enact that a general election shall be held in the several townships and wards of this State, on the Tuesday succeeding the first Monday of November, in the year 1852, and on the Tuesday succeeding the first Monday of November, every second year thereafter," &c.

Now, remember that the special town meetings are held under the law annually on the 1st day of April; but the general elections—the time of holding which the gentleman from Massachusetts [Mr. DAWES] seems to think the township clerk assumes to fix as well as the place—the general elections for governor, members of Congress, and State officers, are held every two years, and the time is expressly fixed by the statute. That is the case in all the States.

Now, sir, this law provides further, that it shall be the duty of the secretary of state to give notice to the sheriffs of the several townships of the officers to be elected biennially at these general state elections; and the sheriffs receiving such notices must serve a copy of them upon the clerks of the several townships, and upon the inspectors of election in the several wards; and that the township clerks, or inspectors of elections, as the case may be, shall issue their respective notices at least ten days before the time fixed, of the place, and call upon the electors to vote. But, in order that I may not misquote the statute, I will read the sections to which reference is made. They are as follows:

"SEC. 35. The secretary of state shall, between the 1st day of July and the 1st day of September preceding a general election, direct and cause to be delivered to the sheriff of each county in this State a notice, in writing, that at the next general election there will be chosen as many of the following officers as are to be elected at such general election, namely: a governor, &c., and a representative in Congress for the district to which each of such counties shall belong. * * * * * * * * *

"SEC. 39. The sheriff, on receiving such notice, shall forthwith cause a notice in writing to be delivered to the township clerk in each township, and to one of the inspectors of election in each ward in any city of his county, which notice shall contain, in substance, the notices so received by such sheriff."

Now let us go one step further. We have got down to the sheriff and his duties. He having to discharge his duty, the clerk also has certain duties to discharge; and, to show that the township clerk discharged his duty according to the law, its letter and its spirit, and that he appointed this election to be held at Wilson's, where it was legally held, and that the law regulating township meetings on the first Monday of April has no application to the general election, section forty-one provides:

"The township clerk or inspector of elections, receiving either of the notices so described in this act to be delivered to him, shall, by notice in writing, under his hand, give at least ten days' notice to the electors of the township, or ward, of the time and place at which such election is to be held, and the officers to be chosen," &c.

The gentleman from Massachusetts objected that the township clerk had no right to fix the place. I say, if the township clerk had no right to fix the place, then the statute law of Michigan is silent upon the subject; and as there is no other law prohibiting the fixing of the place, he is bound, under this statute, to fix the place. The statute provides that, upon receiving the notices from the sheriff, he shall, under his hand, give notice to the electors of the time and place. What time? The time prescribed by the statute of the State—the Tuesday after the first Monday of November, every second year. What place? The place designated by the clerk of the township. That was done. That was the only place where it could be held.

It is contended that the place of holding election was changed, without authority of law, from Kline's to Wilson's. I say that these municipal regulations have no reference whatever to the general election, and that it was not only the right of the town clerk, but his duty, to fix the time and to fix the place.

Mr. STRATTON. * * * * * Most of the gentleman's argument was devoted to that portion of the report made by the majority of the committee in which they come to the conclusion that the poll from the fourth ward of the city of Detroit ought to be deducted. That is one of the points upon which the resolutions of the majority are based. The ground upon which it is claimed that this poll should be deducted from the vote of Cooper is this: upon the morning of the election Alderman Dudgeon, who was, by virtue of his office, *ex officio* judge of election, refused to act as such judge or inspector. The electors then present, in accordance with the law of Michigan, elected Mr. Katus to fill the vacancy occasioned by the resignation or declension of Alderman Dudgeon. But there is one significant fact in this case which is not referred to in the report of the minority of the committee, and which seems to have been sedulously kept out of sight by the gentleman from Georgia; and that fact is, that this Alderman Dudgeon, who declined to discharge the duties of inspector, was himself a candidate upon the democratic ticket for the high office of State senator. Singular as it may appear, there is no law in Michigan which disqualifies a man from acting as an inspector in an election at which he is himself soliciting the suffrages of the people; but from a proper delicacy, or from some other cause, when the poll opened, Alderman Dudgeon declined to act as inspector, and the electors present, as I have already stated, selected Mr. Katus to fill his place. Mr. Katus was duly qualified, and entered on the discharge of his duties as a judge or inspector of election, and continued so to act until the poll closed, at five o'clock in the afternoon, when, under some strange misapprehension of his duties, he retired from the poll, and Mr. Dudgeon, who had declined to act in the morning—who had taken no oath such as is required by the law of Michigan—and without authority from the electors present, resumed the place which he had voluntarily vacated, and performed the important function of counting up and canvassing the votes cast at an election in which he was himself a candidate.

Now, sir, I call the attention of the House to the fact that the statute of Michigan provides that the inspectors shall continue to act as such during the continuance of the election. This man, Captain Katus, was chosen as inspector; he entered upon the discharge of his duties, and continued to receive votes at the polls until the votes were all in and the boxes closed. Did his duty then cease? Was the election then over? I think not. On the contrary, after the polls had been closed, then there remained the very important duty of counting, of canvassing, and making a return of the number of votes cast. The election was not completed until after the ballots had been counted and the returns made by the inspectors to the proper authorities. Until all this was done there "was a continuance of the election," in the legal meaning of the word; and Katus was the only person authorized under the law, with his co-inspectors, Tillman and Lacroix, to discharge that important duty which rendered the election complete. But we find that Dudgeon, who in the morning, on his own motion, had retired, at five o'clock, when the polls had been closed, stepped in again and assumed to act as inspector in completing this important part of the duty of inspector in connexion with an election under the laws of the State of Michigan.

Now, Mr Speaker, the committee believed this fact sufficient to justify this house in rejecting this poll. They believed that there had been a gross and palpable violation of the law; that this man had no right to act as inspector, having declined so to act in a former part of the day, and another appointed to act in his place. This Katus having been appointed, he was the only person authorized to act, in conjunction with the other inspectors, as inspector. But this man Dudgeon, who was himself a candidate for office, steps in, and, without the sanction or solemnity of an oath, assumes the functions of inspector, and proceeds to canvass and count the votes.

* * * In reference to the question of legal residence, I beg leave to call the attention of the House to an authority. The argument made by the honorable gentleman from Georgia [Mr. Gartrell] is, that these men, being there in person on the 2d of November, 1858, and having been there ten days before the election, no matter for what purpose they came, if only to cast their votes, they were, therefore, under the laws and constitution of Michigan, entitled to vote. I do not so understand it. There must be a *bona fide* intention

upon their part of making that place their place of residence and their domicile for some proper and lawful purpose. The mere fact of their going into some election district ten days or weeks before an election, simply for the purpose of casting their votes, does not make them residents, and therefore does not make them legal voters. This point has been decided by the supreme court of Indiana, in the case of French *vs.* Lighty, to be found in the ninth volume of Indiana reports. The decision is as follows:

1. To gain a domicile in this State, the citizen of another State must remove, locate, and intend permanently to remain here. Residence without such intention operates no change of political rights; and such residents cannot vote in this State. Thus, also, a residence in a county for any length of time, on business, on a visit, for pleasure, or for any temporary purpose, with intention to return to a domicile elsewhere, or without intention to remain for an indefinite time at least, is no abandonment of the former domicile, and gives no domicile in the county where such temporary sojourn is made, and consequently no right to vote at such temporary place of residence. * * * * *

4. A single man can be no more without a fixed domicile than a man of family; and though the domicile of the former may be more difficult to find and prove, yet the rules of evidence by which it is ascertained are the same as those applicable in determining the domicile of other persons.

That is the rule of the supreme court of Indiana, and I presume it is the acknowledged law of the land everywhere.

The House (May 15) adopted the resolutions of the committee—the first declaring that the sitting member, Mr. Cooper, was not entitled to the seat, yeas 97, nays 77; the second that the contestant, Mr. Howard, was entitled to it, yeas 92, nays 71.

NOTE.—The debate upon the preliminary question in this case is in vol. 40 Congressional Globe.

For the report: Mr. Campbell, pp. 1308, 1317; Mr. Howard, p. 1313; Mr. Stratton, p. 1318. Against the report: Mr. Stevenson, p. 1309; Mr. Millson, p. 1315; Mr. Vallandigham, p. 1317.

The debate upon the main contest is in vol. 41 Congressional Globe.

For the report: Mr. Dawes, p. 2095; Mr. Stratton, p. 2106; Mr. Gilmer, p. 2109. Against the report: Mr. Gartrell, p. 2101.

THIRTY-SIXTH CONGRESS, FIRST SESSION.

WILLIAMSON *vs.* SICKLES, *of New York.*

The contested election law of 1851 is not of absolute, binding force upon the House; it is a wholesome rule not to be departed from without cause.

The contestant having in good faith, (according to the belief of the committee,) neglected to take testimony under the law of 1851 after legal advice that there had been no such "determination of the result of said election" contemplated in the act as would allow him to serve notice upon the sitting member, the committee recommended the House to grant authority to take testimony "after the expiration of the sixty days."

IN THE HOUSE OF REPRESENTATIVES,

MARCH 12, 1860.

Mr. DAWES, from the Committee of Elections, made the following report:

That the contestant has not proceeded in conformity to the directions prescribed in the statute of February 19, 1851, which provides that the contestant shall serve notice of contest upon the sitting member within thirty days after the result of said election shall have been *determined* by the officer or board of canvassers authorized by law to determine the same, and that the sitting member shall answer the same within thirty days, and all testimony shall be taken within sixty days thereafter, and is now before the committee without legal evidence. He alleges, as a reason, that the circumstances of this case are so

peculiar that the statute has no application to it, and that he was therefore unable to avail himself of its provisions. The facts of this case, so far as they bear upon the preliminary question now submitted to the House, are as follows:

The election for representative to Congress in the several districts of the State of New York to this Congress was held on the 2d day of November, 1858. By the laws of that State it is made the duty of the inspectors in the several election districts to certify the result of the poll in their respective districts with one ballot of each kind cast attached thereto to the county canvassers, who are required to certify the several results in the entire districts, thus reported to them, to a board of State canvassers at Albany. It is made the duty of the State canvassers, from the certified copies of the statements made by the boards of county canvassers, to proceed to make a *statement* of the whole number of votes given at such election for representative in Congress. Upon such statement they shall then proceed to *determine* and *declare* what person has been by the greatest number of votes duly elected to such office."—(R. S., vol 1, part 1, ch. 4.) It is further made the duty of the secretary of the State of New York, without delay, to transmit a copy, under the seal of his office, of such *certified determination* to each person thereby declared to be elected, and a like copy to the governor, and cause a copy of such certified *statements* and *determinations* to be printed in each senate district, and shall also transmit to the House of Representatives of the United States, at their first meeting, a general certificate of the due election of the persons so chosen representatives in Congress.—(Ch. 5.)

The board of county canvassers for the county of New York, in certifying to the State canvassers the votes cast in the several congressional districts in the city of New York, certified them to have been cast for "member of Congress," instead of for "representative in Congress," the office designated in the constitution and laws.

It was admitted before the committee that this was a mistake of the county canvassers, and that they afterwards sent to the State canvassers a statement that the ballots returned by the inspectors to them were styled for "representative in Congress," and no claim is made to the seat on account of this mistake. But the State canvassers, inasmuch as the county canvassers had not certified that any votes had been given for "representative in Congress" in the city of New York, considered themselves precluded from *determining* and certifying that any person had been elected in the several districts (six in number) in the city of New York. They made, in conformity to law, as to all the other districts in the State, a statement of the whole number of votes given in such districts, and upon such statements they proceeded to *determine* and *declare* who were elected. This statement and *determination* they published, as required by law. The secretary of state sent to each of the persons so declared to be elected a certified copy of such *certified determination*, and certified the same to this house in an official certificate addressed to the House of Representatives. A copy of this certificate, forwarded to the other members from New York, is appended to this report. But in respect to the district here contested, and the other districts in the city of New York, they published a statement of the votes, but for the reasons heretofore given they "further certify that inasmuch as said office was not legally designated in the returns of the county canvassers of the said county of New York, made to this board, we *cannot* certify to the election of any person to the office of representative in Congress in the said respective districts." A copy of this statement is also appended to this report.

They sent no copy of this statement to any person claiming to be elected from the third district of New York, nor did they address any copy of it to this house; and the only commission which Mr. Sickles has from the authorities of the State of New York is a certified copy of this statement, which he obtained

on application and payment of fees for copy, at the secretary's office in Albany, a few days before this session commenced—November 28, 1859.

While the votes were before the State canvassers, and before their action became known, Mr. Williamson made preparations to contest the seat in the mode pointed out in the statute of 1851. He employed counsel for that purpose, and prepared, in part, the notice of contest required by that statute. But when those canvassers published their action he was advised by his counsel that there had been no such "determination of the result of said election" as is contemplated in said act, and that until such determination was made he could not under said law serve notice upon Mr. Sickles more than Mr. Sickles upon him, for both were equally without evidence of his right to the seat from the constituted authorities of New York, and that he could not, by the authority of said act, obtain compulsory process for the attendance of witnesses, or compel them to attend and testify under the pains and penalties of perjury. He therefore abandoned further proceedings under said act, and appealed to the House at the earliest practicable moment after the organization, for a commission to take testimony, believing this to be his only mode of obtaining any evidence beyond voluntary testimony. The answer of Mr. Sickles to the petition and to this application to take testimony, and also his brief in its support, are appended to this report, as is the brief of the petitioner in reply thereto.

The committee do not consider the law of 1851 as of absolute, binding force upon this house, for by the Constitution "*each* house shall be the judge of the elections, returns, and qualifications of its own members," and no previous House *and* Senate can judge for them. The committee, however, consider that act as a wholesome rule, not to be departed from except for cause. But the conclusion to which they have arrived upon this application renders it unnecessary for them to settle the question whether the action of the State canvassers was such a "determination of the result of said election" as is contemplated in that statute, so as to bring the case within its provisions. There obviously can arise cases not within the provisions of that act in which the parties must apply to the House itself for authority to take any other than voluntary testimony; and the act of 1851 itself provides for cases which may arise, about which there can be no doubt as to the determination of the result, and that they are in all things within its provisions, and it enacts that the House may, *at their discretion*, "allow supplementary evidence to be taken after the expiration of said sixty days."

Under this provision the House has, on the recommendation of its committee, on different occasions, allowed further time where the ends of justice seemed to require it, and that in cases admitted to be in all respects within its provisions. The House can and has extended time under the law, as well as in cases to which it does not apply. The committee believe the contestant has acted in good faith, and has been induced to the course he has taken by the belief, after legal advice, that it was his only mode of proceeding beyond the taking of testimony voluntarily given. They do not speak of the merits of the case, for no legal evidence has been presented to them, and this is solely an application for process to take testimony. They do not intend, therefore, any prejudice to the case of the sitting member when they bring to the notice of the House the allegations of the contestant contained in his petition, and the affidavit of his attorney, which he has made a part of it.

The contestant alleges that frauds of the most serious and gross character were committed in behalf of the sitting member, which, if proved as alleged would entitle him to the seat. He produces the affidavit of his attorney, who makes oath that he has it from the lips of a "number of persons who were the active supporters of Daniel E. Sickles at the said election, *and who participated in the fraudulent voting for* said Sickles, that there were illegal votes cast for said Sickles, to their knowledge, and that the aggregate number of such illegal

votes received by said Sickles, according to the statement made by such persons to this deponent, will exceed three hundred;" "that he has been informed by several persons that said Sickles furnished *them* money to pay persons for voting for him who were not entitled to vote in said district, and instructed them to procure such illegal votes, and that he also furnished large sums of money to other persons for a like purpose;" "that he knows the persons from whom he obtained such information to have been active supporters and agents of said Sickles in the canvass, and that they voluntarily stated to him that the said Sickles was not legally elected, but they declined to make any further statements, or to make affidavit of the statements made to deponent." It is due to Mr. Sickles that the committee should state that he denies these allegations. But this is what the contestant offers to prove, and the committee do not feel at liberty, under the circumstances of this case, to close the door against him, and thereby prevent the exposure of such frauds, if they exist.

If this were considered only as a contest between two individuals, in which no one had an interest except Mr. Williamson and Mr. Sickles, the committee do not see that the conclusions to which they have arrived impose any hardship upon the sitting member. He enjoys all the rights and privileges of a member to the fullest extent during the delay, precisely the same as if this application were denied. The burden of taking testimony is no greater now than it would have been the first ninety days after the election; and if the lapse of time enhances the difficulty of obtaining proofs, that labor rests upon the contestant. But the constituency has a greater interest than all others in this question. The rights of the electors of the third congressional district of New York are involved in this controversy, and should not be compromitted by any laches, if any exist, for which they are not responsible. It is of more consequence that their voice should have expression here through their lawfully elected representative, whoever he may be, than that this or that man should enjoy the emoluments or honors of the office; indeed, all other questions are merged in this, and mere delay is of little consequence when the House is called upon to determine whether that voice has been stifled by fraud. The committee are constrained by these considerations to report the accompanying resolution, and recommend its adoption:

Resolved, That A. J. Williamson, contesting the right of Hon. D. E. Sickles, to a seat in this house as a representative from the third district of the State of New York, be, and he is hereby, required to serve upon the said Sickles, within ten days after the passage of this resolution, a particular statement of the grounds of said contest, and that the said Sickles be, and he is hereby, required to serve upon the said Williamson his answer thereto in twenty days thereafter; and that both parties be allowed sixty days next after the service of said answer to take testimony in support of their several allegations and denials before some justice of the supreme court of the State of New York, residing in the city of New York, but in all other respects in the manner prescribed in the act of February 19, 1851.

All of which is respectfully submitted.

H. L. DAWES.
JAMES H. CAMPBELL.
GILMAN MARSTON.
JOHN L. N. STRATTON.
ROBERT McKNIGHT.

I concur in the result.

W. W. BOYCE.

MINORITY REPORT.

Mr. GILMER submitted the following views of the minority of the committee:

The undersigned, members of the Committee of Elections, to whom was referred the petition of Amor J. Williamson, contesting the election of Daniel E. Sickles, a representative from the State of New York in the thirty sixth Congress, respectfully submit:

That it appears (see petition, exhibit A) Mr. Williamson, Mr. Sickles, and Hiram Walbridge were candidates at the last regular election for members of Congress in New York, which was held on the 2d of November, 1858. The whole number of votes cast was 9,084, of which Mr. Sickles received 3,176, Mr. Williamson 3,015, and Mr. Walbridge 2,874; no one received a majority, but Mr. Sickles had a plurality of 161 votes, and a plurality elects by the law of New York. The returns were duly canvassed by the board of county canvassers, and the usual official statement of the votes transmitted to the board of State canvassers at Albany. This board consists of certain State officers, whose duty it is to declare the result of the election, and upon this the secretary of state is required to make out and deliver to the person thus ascertained to have received the greatest number of votes the usual certificate of election. It seems that when the board of State canvassers came to examine the "statement" of votes certified to them from the board of county canvassers, the votes given in the city of New York, in all the six congressional districts, were described as having been given for "member of Congress," and not for "Representative in Congress." This occurred through the carelessness of the clerk of the county board. It is admitted on all hands, and it was officially certified to the State canvassers, that the *ballots* were properly indorsed "For *representative* in Congress." Strangely enough, the board of State canvassers deemed the description of the votes in a tabular statement, in which the clerk used the colloquial and every-day term, "*Member* of Congress," instead of the more formal designation "*Representative* in Congress," a sufficient reason to make out a special statement of the facts and enter it at large upon record, instead of the ordinary certificate of election.—(See exhibit C.) Nothing further was heard of the matter. At a meeting of Congress in December, 1859, the six members from the city—Messrs. Sickles, of the third; Barr, of the fourth; Maclay, of the fifth; Briggs, of the sixth; Cochrane, of the seventh, and Clark, of the eighth—presented themselves and filed with the clerk, as their credentials, a certified copy of the "statement" before mentioned.—(Exhibit C.) They took their seats without objection, protest, or contest from any quarter, and for two months prior to the organization of the House voted upon all questions. Upon the election of the Speaker, all these six members were found duly qualified and took the constitutional oath of office. On the 9th of February, 1860, one year and three months after the election, Mr. Williamson's petition was filed with the clerk, under the rule, and indorsed with the usual reference to this committee. The chairman, at an early day, notified Mr. Sickles that such a petition was before the committee, and this was the first notification ever addressed to the sitting member that his seat was to be contested. Mr. Sickles appeared before the committee on the 13th of February, the time appointed, and raised certain preliminary objections to the consideration of the case, which are set forth in his answer and points.—(See exhibit D.) After an oral discussion between the contestant and the sitting member, time was given to the contestant to prepare a written argument in answer to the positions taken by the sitting member, which was submitted on the 5th instant to the committee.—(See exhibit E.)

The question presented is whether the petitioner is entitled to any relief.

If his case is embraced within the act of 1851, it is conceded that he is without remedy. While this act was never intended to embarrass any proper inquiry into abuses of the elective franchise affecting the representative of a constituency in this house, it certainly had for its object the salutary purpose of prescribing a course of proceeding to be observed by interested parties that would remedy evils which had notoriously brought reproach upon the privilege of contesting an election to the House. The act of 1851 was the result of much previous study of the subject, and was not passed until years of discussion

and deliberation had proved the necessity of legislation. The act is designed to embrace all contests growing out of elections to this house.

The contestant (sec. 1) is required, within thirty days after the result of the election is officially promulgated, to give notice of the contest, specifying particularly the grounds relied upon. The opposite party must, within thirty days, (sec. 2,) answer such notice, admitting or denying the facts alleged therein. Then the parties proceed to examine witnesses in support of the issues presented by the pleadings.—(Secs. 3 to 8 inclusive.) The testimony (sec. 9) must be confined to those issues. The testimony so taken is, in conformity with the provisions of the act, to be transmitted to the House.

If the contestant had observed the requirements of the law, this case, like all the others before the committee, would have been investigated while the facts were of recent occurrence and the witnesses on both sides accessible, and the case would be now ready for hearing upon pleadings and proofs. But no steps whatever were taken by the contestant, and he proposes now to begin proceedings. Such a course would have been deemed most extraordinary prior to the law of Congress, but since the act of 1851, it is alike illegal and unprecedented.

If it were pretended that the matter upon which the contestant relies had recently come to his knowledge, this might be urged in excuse for a non-compliance with the law and usage. But, on the contrary, the petitioner shows (see affidavit of McIntire annexed to petition) that he employed counsel shortly after the election "to take such measures and obtain such proofs as would enable said Williamson to establish his election."

It is, however, claimed that the contestant was relieved from the obligation of complying with the law of 1851 because of the clerical error which happened in the designation of the *office*, not on the *ballots*, but in *the form* filled up by the returning officer. This error was common, not only to all the districts of the city, but embraced all the candidates, and the contestant as well as the sitting member from the third district. If this misdescription of the office so impaired the evidence of the election as to deprive the sitting member of the right to notice of the contest, it equally disqualified him and five of his colleagues from all right to occupy seats in the House. And yet such has not been the judgment of the House. The undersigned did not feel at liberty to disregard the fact that six members from the city of New York had held their seats all the session upon the same evidence, no elector, no member of the House, no rival candidate objecting.

It is conceded on the part of the petitioner that if the sitting member had *prima facie* any right to a seat in the House the controversy is at an end. (See sixth point in petitioner's argument, exhibit D.) If the action of the House, by accepting the credentials as sufficient, had not already settled this question, the unreserved acquiescence of Mr. Williamson in the occupancy of the seat by Mr. Sickles ever since the meeting of Congress would seem to be conclusive.

But if the *prima facie* right of the sitting member requires any further support than the undisputed action of the House in relation to himself and five colleagues, and the unbroken silence of the contestant for fifteen months, and the universal acquiescence of all the electors in the city of New York, it is to be found in the announcement of the board of state canvassers, (exhibit C.)

This official statement of the result of the election, signed by the attorney general, secretary of state, comptroller, and the entire board, only differs from the ordinary certificate in this: *that it is more than a certificate; it is the canvass itself.* A certificate is merely the declaration of the conclusion of others from the facts. The credentials of the six members from the city, including the sitting member in this case, give all the facts showing them to be duly elected. There was no protest made by Mr. Williamson before the board of state canvassers. No objection to any of the returns was made from any dis-

trict in the city, either by citizens or candidates. No one doubted that the result of the election was fully determined and declared in favor of the six members having the apparent and unquestioned plurality. Their *prima facie* right was perfect on the face of their credentials. The quibble about the difference between "member of Congress" and "Representative in Congress" was never worth a moment's consideration anywhere.

It was the clear right of the public, and of all concerned, to have the result of the election determined and declared as required by law. This was the sworn duty of the board of state canvassers. (See extract from election laws of New York, exhibit F.)

It must be perceived that all that was legally necessary to be done was done; and that as the members elect from the city were entitled to full and complete evidence of their election, that they received it. To say that the result of the election was not determined in favor of any candidate, and could not be declared because of the paltry clerical inadvertence in calling the *office* "member of Congress," becomes, indeed, preposterous when this position is pressed to its legitimate consequence. If the result was not determined, and could not be declared, then it follows there was no election; and the will of the people of six districts, constitutionally and legally expressed, would be set aside for no other reason than a trivial misdescription, resulting either from the carelessness or the malevolence of a scrivener. In that case a new and special election for all the city districts would have been called by the governor and secretary of state as in cases of vacancy; but no such action was taken, or even contemplated, by any of the authorities. If, on the other hand, the election was determined, and the result ascertained, then the members were legally entitled to their full certificates of election, and any court of competent jurisdiction, proceeding by *mandamus*, would have compelled the proper officer to issue the certificates. This course would, possibly, have been pursued if anybody had supposed that the House of Representatives would hesitate, as they did not, to accept the credentials already made out. Either the result of the election was determined, or it was not; if not, then there was no election; and yet this is not pretended. If it was determined, it was in favor of the sitting member and his colleagues, for there could be no other result arrived at, they having the greatest number of votes. Then it must be presumed that they received the credentials to which by law they were entitled, otherwise the omission of returning officers to perform a ministerial duty would be allowed to defeat the choice of the people. The refusal of a governor to grant a certificate does not prejudice the right of a person entitled to a seat upon the face of the returns.—(*Richards's case, Clark & Hall, Com. Ele. in Conf.*, p. 95.)

It is the settled law of all parliamentary bodies (see *Cushing's Law and Practice*, S. 174) that whenever returning officers undertake to relieve themselves of a responsibilty by making a conditional return—that is, by stating facts and referring the question of their legal operation to the judgment of the body—the return will be received as an unconditional one. The House having plenary power to judge of the election and qualification of its members is never to be embarrassed by forms, but looks always to the substance and the facts. And if the House sees upon the face of the credentials the fact that a claimant has the greatest number of votes he will be admitted to a seat, upon the presumption that he has received the formal certificate of election to which the facts before the House entitled him at the hands of the returning officer.

It is therefore established—

1. That the sitting member received the greatest number of votes.
2. That this was declared and determined by the board of state canvassers.
3. That the statement of the result by the board of canvassers was a sufficient *prima facie* title to a seat in the House.

4. That the House so regarded it is manifest, because it was accepted without objection from any member, the facts and the nature of the credentials being public and notorious, and six members holding seats upon the same *prima facie* title.

5. That no elector from any district in the city has ever objected to the right of the sitting members.

6. That Mr. Williamson made no objection before the boards of county or State canvassers, nor any protest to the House of Representatives against the admission of Mr. Sickles to all the rights of a sitting member.

From these premises the following conclusions are irresistible:

1st. That the committee is bound, by the action of the House upon the subject-matter, to presume that the sitting member had a *prima facie* title to a seat.

2d. That Mr. Williamson, making no objection by way of protest or otherwise to the occupancy of the seat by Mr. Sickles, or to his being sworn in, is estopped from maintaining as a reason for not giving notice of contest and proceeding with the case in obedience to the law of 1851, that the sitting member had "no *prima facie* right or title so a seat," and therefore was not entitled to notice.

3d. That having entirely failed to comply with the law of Congress prescribing the necessary steps to be taken by contestants, the petitioner is, by his own default, without remedy.

4th. That it is not competent for the committee to recommend any action to the House which involves a violation of the law of 1851, because as a law of Congress it is obligatory alike upon the House, the committee, and the contestant; that the act relating exclusively to the initiation of the proceedings, the taking of testimony and the *preparation of the case* for the *decision* of the House, does not infringe upon the constitutional prerogative of the House to *judge* of the election, return, and qualifications of its members."

But, leaving entirely out of view the law of Congress, and looking at the case as if it had occurred prior to the act, the undersigned submit that the petitioner has deprived himself of any just claim for leave to prosecute this contest, because under any aspect of the case the sitting member was entitled to *reasonable notice.*

If notice had been given in sixty or ninety days, or four months, after the canvass, and the application now was to be relieved from the thirty-day limitation in the act of 1851, the case might stand upon some equitable foundation. If notice had been given within some reasonable period, and the contestant had merely neglected to use due diligence in *taking testimony*, there might perhaps have been presented reasons for granting further time, although such applications are never looked upon with favor.—(See Newland *vs.* Graham, House Rep., vol. 2, No. 378, 1835–'36. Also, sundry elections of Ohio *vs.* Allen, 1833, Rep. 110, vol. 1. Vallandigham *vs.* Campbell, 35th Congress, Rep. No. 50, vol. 1.)

In this case no notice at all was given, and no testimony whatever has been taken. Surely this becomes all the more inexcusable when the peculiar circumstances of this case are considered. The election took place in November, 1858, and the petition was presented on the 9th of February, 1860. In all the intervening period it does not appear that the contestant ever took a single step to *indicate the intention to claim the seat.* He did not enter any objection, or protest, or claim before either the county or State canvassers; he gave no notice of contest; he took no testimony; he did not claim the seat at the opening of Congress, or dispute the right of Mr. Sickles to the seat. After the election of Speaker, no objection by way of protest from Mr. Williamson, or from any member in his behalf, was made to Mr. Sickles being sworn in as the sitting member. Under these circumstances the sitting member was left undisturbed

by any apprehension of a controversy, and of course could take no steps to defend himself against charges affecting the election, of which he had never been informed.

The object of reasonable notice is to enable the parties, while the events are of recent occurrence, to collect the testimony bearing upon the issues. It will never do to allow a party to keep to himself the secret purpose of contesting an election for fifteen months, and in the mean time, as he himself avows, *(affidavit of McIntire, his attorney, Exhibit A,) "to take such measures and obtain such proofs as would enable him to establish his election,"* which from the lapse of time and from the sense of security into which the opposite party has been lulled, he is placed at the greatest conceivable disadvantage in the investigation, should it be allowed to proceed. Besides, apart from the injustice, expense, and inconvenience to which the sitting member is subjected, such an investigation would at best be essentially *ex parte*, and not calculated to elicit the facts upon *both* sides, on which the judgment of the House could be safely and satisfactorily based.

Furthermore, it is for the convenience of the House, and to subserve a desirable public economy, that reasonable notice of contest is required. The case is thereby placed in a position so that it can be heard and decided at an early period of the session. The district would not be left without a representative, "while" the testimony is being taken, for which the presence of the parties is always deemed to be necessary. In the case of sundry electors of Ohio *vs.* Allen, 1833, Report 110, volume 1, the Committee of Elections unanimously rejected all the testimony and refused to proceed with the case, saying, "the objects of requiring notice to be given were totally defeated by the course pursued by those citizens who contested the return of Mr. Allen," because the periods of time and the distances of the places from each other at which the testimony was to be taken were so arranged as to make it impossible for Mr. Allen to attend and cross-examine witnesses.

An examination of the cases which have been decided for the past twenty years shows that the House has always discountenanced propositions which favor delay in controverted elections, for the reason that this course is harassing and vexatious to the rightful claimant, and encourages parties to look for compensation in proportion to their address in prolonging the contest, while at the same time inducements are multiplied for the prosecution of contests upon frivolous grounds.

Again, there are no public reasons suggested in this case for a departure from the law and usage with reference to notice and the taking of testimony. It is a mere question whether Mr. Williamson has any claim to be allowed to prosecute a contest under circumstances of neglect, for which no precedent has been found, and where the sitting member is not in fault. No electors petition for an inquiry into the canvass. No one complains except a party interested as a contestant. The charges which he makes are exceedingly indefinite and vague. They are not supported at all, except by a loose affidavit from his own attorney; nor does the attorney state any fact from his own knowledge, nor does he give any of the facts in detail which he says were disclosed in the conversations he had with others; and yet he says he was employed soon after the election in 1858 to make out his client's case.

When it is made to appear that frauds have been practiced in the election of members to the House, of course anybody may ask to be heard at any time, quite irrespective of the principles or regulations which are observed in acting upon cases of contested elections between rival candidates. This is not such a case. Nothing has been adduced before the committee to warrant the least impeachment of the right of the sitting member. No court would ever put a party upon his defence upon any of the averments in the petition. No legislature would think it proper to order an inquiry into an election upon such

allegations. The undersigned cannot see in the circumstances any excuse, upon such a lame showing on the part of the contestant, for putting a member of the House to the cost, trouble, and hindrance from his legislative duties, which will be involved in granting permission to the contestant to begin now a contest which should have been to-day ready for the decision of the House. Under the most favorable circumstances the whole of the remainder of the present session must be occupied in those proceedings in the case which should have been disposed of in advance of the meeting of Congress. The case cannot come up for further hearing before the committee until the next session. The leading cases in the House for a quarter of a century show this application to be without precedent, and the undersigned submit it is without reason or justice.—(See Botts *vs.* Jones, 28th Con., 1844, vol. 2, Rep. 492, Virginia; notice given and testimony taken before the meeting of Congress. Sundry electors of Ohio *vs.* Allen, 1833, 23d Con., Rep. 110, vol. 1; notice given and testimony taken before meeting of Congress. Newland *vs.* Graham, North Carolina, 24th Con., 1836, Rep. 378, vol. 2; notice given and depositions taken before the meeting of Congress. Brockenbrough *vs.* Cabell, Florida, 29th Con., 1845, Rep. 35, vol. 1; notice given and offered as evidence, also depositions taken before the meeting of Congress. Farlee *vs.* Rusk, New Jersey, 29th Con., 1845, Rep. 310, vol. 2; notice given and depositions taken before the meeting of Congress. Miller *vs.* Thompson, Iowa, 31st Con., 1850, Rep. 400, vol. 3.)

These cases were all prior to the law of 1851, and established that *reasonable notice* and *diligence in proceeding to take testimony was invariably required*, under the practice of the House, and that such was and is the general parliamentary usage.

This case presents distinctly the question whether the law of 1851 is to be enforced or not. If it is to be suspended arbitrarily by the House, or so construed as to be practically inoperative, it is, in effect, repealed, and the whole system of procedure in cases of contested elections thrown open to the unexplored domain of legislative discretion.

The undersigned recommend the adoption of the following resolution:

Resolved, That the petitioner, Amor J. Williamson, having failed to comply with any of the provisions of the law of Congress, or the usages established by parliamentary assemblies regulating the proceeding of parties to cases of contested elections, and not having proceeded with due diligence to establish his alleged claims, have leave to withdraw his petition.

JOHN A. GILMER.
J. W. STEVENSON.
LUCIUS J. GARTRELL.

MARCH 12, 1860.

The debate in the House was confined closely to the legal points raised in the majority and minority reports. The House adopted the resolution reported by the committee—yeas 80, nays 64. On the 17th of May the case was brought up again:

Mr. DAWES. I rise to a question of privilege. On the 21st of March the House passed a resolution authorizing a justice of the superior court of the State of New York, residing in the city of New York, to take testimony in the case of the contested election of Williamson against Sickles. Those judges have certified to the House that they are unable, for want of time, to discharge that duty. The Committee of Elections have agreed upon a resolution which seems to be satisfactory to both parties; and upon that resolution, which I now present, I call the previous question.

Mr. SICKLES. I hope the gentleman will not call the previous question until we have heard the resolution read.

Mr. DAWES. Very well.

The resolution was read, as follows:

Resolved, That the judges of the superior court of the State of New York, residing in the city of New York, be, and they are hereby, authorized and requested to appoint and select a commissioner of the degree of counsellor-at-law, whose duty it shall be to take the testimony

in the matter of Amor J. Williamson, contesting the seat now held by Hon. Daniel E. Sickles, from the third congressional district of the State of New York, as provided and directed by the resolution passed by the House of Representatives on the 21st of March, 1860. It shall be the duty of the said commissioner so appointed to enter upon his duties immediately after his appointment, and after giving five days' notice to the parties to this contest, to proceed from day to day with the examination of such witnesses as may be brought before him in support of the allegations of the contestant and certain allegations of the sitting member, until the case is closed; provided such examination does not extend beyond sixty days from the time of commencing the taking of such testimony. It shall be the duty of the commissioner appointed under this resolution to provide the attorneys of the parties to this action with such number of subpœnas, issued by the Speaker of this house, as they may require for the witnesses they desire to call. The said commissioner is hereby directed to take up the case from the point which it had reached at the time it was brought before the superior court on the 16th of May, 1860; and all notices given on either side are hereby declared good without further action. All witnesses must be sworn by some officer authorized by the laws of the State of New York to administer oaths. On the conclusion of the case, it shall be the duty of the commissioner hereby provided for to transmit a correct copy of the evidence, pleadings, &c., under oath, to the House of Representatives. And each party is hereby authorized to take the testimony of any witnesses resident in the State of New Jersey, before any judge of a court of record or magistrate authorized to take depositions, resident in the State of New Jersey; and said judge or magistrate is hereby authorized to do each and all things in the premises which the commissioner hereinbefore mentioned is by this resolution authorized to do. The time for the taking of testimony under this resolution is not to commence till the day of the adjournment of the first session of this Congress, and is to extend sixty days thereafter, with the exception of such witnesses not resident of, or living in, or being about to leave, the State of New York, as the contestant may desire to subpœna and examine before said adjournment; and as to such witnesses, the commissioner or judge aforesaid, or either of them, is hereby authorized in manner aforesaid to take and forward their depositions at any time after the passage of this resolution and before the expiration of said sixty days, when application shall be made to him for that purpose by the contestant.

The resolution was agreed to.

In the second session, on January 31, 1861, Mr. GILMER, from the Committee of Elections, made the following report:

The Committee of Elections having duly examined the evidence in the case of Amor J. Williamson, contesting the seat of Hon. Daniel E. Sickles, from the third congressional district of the State of New York, after hearing the parties, report that the contestant has not shown sufficient ground to disturb the sitting member, and they ask to be discharged from the further consideration of the case.

The committee, however, feel it but justice to the contestant to say they are well satisfied that he commenced this contest in good faith, having before him at the time such facts and circumstances as to induce him honestly to believe that he was entitled to the seat, and would be able to prove it.

They further state, but without any intimation against the right of the sitting member to his seat, that the facts and circumstances which appear in the case show that contestant had assurances of his being able to prove sufficient to make good his claim; but, by way of excuse for his failure, may be mentioned, properly, the long delay in commencing the investigation of the incidents of a city election, occasioned by the doubt as to whether notice of contest should be given, inasmuch as the sitting member had not the usual and regular certificate; the difficulty of finding witnesses, who had changed their residences; obstructions arising in the way of procuring witnesses, usual in showing the true state of facts as to an election held among a floating population, and many other difficulties, such as getting process to secure the attendance of witnesses.

The case was not reached in the House.

NOTE.—The debate will be found in volume 40. For report: Mr. Dawes, page 1255-1285; Mr. Campbell, page 1261; Mr. Conkling, page 1263; Mr. Humphreys, page 1280. Against the report: Mr. Gilmer, page 1258; Mr. Gartrell, page 1263; Mr. Cochrane, page 1279; Mr. Sickles, page 1282.

THIRTY-SIXTH CONGRESS, FIRST SESSION.

DAILY *vs.* ESTABROOK, *of Nebraska Territory.*

Votes cast in an unorganized county cannot be counted. The act of a legislature does not organize a county; there must be an election of county officers before it is organized.

The law of a Territory having pointed out a particular mode of making election returns, and appointed certain officers to open and inspect them, if they are opened and inspected by other persons they are thereby vitiated.

Votes given upon an Indian reservation were rejected, on the ground that no voting precinct could be legally established within it.

More than one notice may be served by a contestant under the act of 1851, if served within the proper time.

A court of probate is a court of record. A certified copy of the official abstract of votes filed by the governor in the office of the secretary of the Territory is competent proof of the result of an election.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 20, 1860.

Mr. CAMPBELL, from the Committee of Elections, submitted the following report:

The election out of which this contest has arisen took place on the 14th day of October, 1859. The returns filed in the office of the secretary of the Territory—where, by law, they were required to be filed—show that 3,100 votes were counted for Mr. Estabrook and 2,800 for Mr. Daily. The former having, by this count, a majority of 300, the governor of the Territory issued to him the certificate of election, by virtue of which he is now the sitting delegate.

The committee find, however, from an examination of the evidence before them, that in order to make for Mr. Estabrook the aggregate of 3,100 votes, there have been counted for him 292 votes as polled in the county of Buffalo, 28 votes as polled in the county of Calhoun, 21 votes as polled in the county of Izard, 20 votes as polled at the precinct of Genoa, in the county of Monroe, and, according to their estimate, 68 votes as polled in the county of L'Eau Qui Court, all of which are illegal. And they will proceed to state the reasons which have brought them to this conclusion.

I. As to the votes from Buffalo county:

By an act passed by the legislature of Nebraska Territory March 14, 1855, provision was made for the organization of this county. This is its language: "That all that portion of territory included in the following limits is hereby declared organized into a county, to be called Buffalo: commencing at a point in the centre of the Platte river, ten miles east from the mouth of Wood river; running thence westward up the southern channel of the Platte to the mouth of Buffalo creek; thence north thirty miles; thence east to a point directly north of the place of beginning; thence south to the place of beginning. The seat of justice is hereby located at Nebraska Centre."

No steps were taken, under the laws of the Territory, for the organization of this county by the election of officers; and it is the opinion of the committee that without such election there could be no organization. The act of the legislature does not organize a county; it merely provides for and authorizes an organization—that is, it authorizes an election to be held for county officers, under the general law regulating elections. If no such election is held, the county, notwithstanding the act of the legislature, cannot exercise any of the powers of an organized county, and cannot legally vote either for territorial officers or delegate to Congress.

The legislature of the Territory of Nebraska has provided, by an act "in relation to new counties," "That whenever the citizens of any *unorganized*

county desire to have the same *organized*, they may make application by petition, in writing, signed by a majority of the legal voters of said county, to the judge of probate of the county to which such unorganized county is attached, whereupon said judge of probate shall order *an election for county officers* in such unorganized county." It then provides for a notice of the election, and a return of the votes "to the organized county," the execution of the necessary bonds by the officers elected, and the entire mode of consummating the organization. And it further provides that until this is done "all unorganized counties shall be attached to the nearest organized county directly *east* of them for election, judicial, and revenue purposes."

The committee do not suppose that the legislature intended to dispense with this mode of organization by the simple use of the word "*organize*" in the act creating a county. To suppose that they did would be to assume that they designed to prevent an election by the people of the necessary county officers. They know of no possible mode of legally organizing a county except by the election of officers by the people—a rule which must meet with universal assent under a popular form of government.

It is not pretended that Buffalo county was attached "to the nearest organized county directly *east* of" it for election purposes, for the vote is reported from Buffalo county directly; and hence, the only question to be inquired into is, whether or not it was so organized as that a vote could be legally polled within it?

It appears from the evidence that in May preceding the election the governor of the Territory was solicited "to *appoint* the county officers for Buffalo county," but that finding himself possessed of "no such power," he declined to do it. The governor was clearly right in this determination. He had no power to appoint officers; not even to fill a vacancy. He had once possessed this latter power, but the legislature had taken it away, and had provided that the vacancies should be only filled by election But he was as clearly wrong in the other conclusion to which he came. He says that he considered "that Buffalo county was *fully organized* by the act of the territorial legislature." How it was organized *without officers*, he does not say, and the committee have already stated that, in their opinion, such a thing is impossible. But, acting upon this strange assumption, he says he advised the course which he considered necessary to be taken. This was, that application should be made to the county commissioners of the nearest county on the east to have the initiatory steps taken for the election of county officers. It is not material to inquire whether he was right or wrong in this, because it does not appear that any such steps were ever taken. On the contrary, it is in proof that a few persons met together, without any notice, and, after the manner of a public meeting for political or other purposes, elected a president and secretary, and, upon *mere motion and vote, chose all the county officers!* The proceedings of the meeting were signed by the president and secretary, and forwarded to the governor; who, upon the strength of it, commissioned the officers so chosen, although there is no law authorizing him to issue commissions to county officers. And these are the officers who must have conducted the pretended election in Buffalo county, and who returned the 292 votes sent from that county for the sitting delegate. The committee consider the whole of these proceedings irregular and void in law.

The committee cannot omit further comment upon this extraordinary proceeding; for, to your committee, extraordinary it seems, in every sense of the term. The meeting was held on the 25th of June, 1852, at the place designated in the act of the legislature as the county seat, and where, according to the proof, there is "*one dwelling-house, one storehouse, one barn or stable, and one warehouse*," and where but "*three persons*" constituted the population. The object of the meeting was avowed to be the "*recommending* suitable persons to

fill the several offices of Buffalo county." And this object was carried out by the simple adoption of the several *motions* put to the meeting. For example: Mr. Charles A. Henry moved that Henry Peck be chosen probate judge, Charles T. Lutz sheriff, Joseph Huff commissioner of one of the precincts, Patrick Care justice of the peace, and John Evans constable, and they were all so chosen by the adoption of the motion. And so of all the rest. And then it was resolved "that Dr. Henry, with men living in the eastern precinct, do have them *recommend* suitable persons to fill the offices of justice of the peace and constable" in a precinct not supplied with officers at this meeting. And the whole proceedings closed with a resolution to the effect that the meeting "*recommend* the above-named gentlemen to hold the several offices to which they have been *nominated* by this meeting, and request the *governor* of this Territory to *commission* them for said offices."

It will be seen that this meeting merely "*nominated*" these officers, and *recommended* them to be *commissioned* by the governor; or, in other words, that it designed that the governor should *appoint* them. It has been already stated that the governor had no such power—that he could have nothing to do with the selection or commissioning of officers. Yet, notwithstanding this want of power, he did both *appoint* and *commission* the persons recommended and nominated by this meeting, and several others who were not recommended. It needs no argument to prove that no authority to hold an election or to transact any county business was conferred upon these persons by his act, and that all their proceedings are absolutely void. It is of no consequence to inquire what power he considered himself as possessing, since the fact that he did *appoint* them appears in proof. In a letter dated July 26, 1859, and written from the "executive chamber," to one of the persons nominated to him, he says: "I have this day *appointed* the following officers," &c., going on to enumerate those who were nominated by the meeting. All these proceedings were in clear violation of law.

The foregoing facts in relation to the pretended organization of Buffalo county being made by the contestant, and the sitting delegate having offered no evidence of any other organization, it is necessarily to be inferred that there was no other; since, if there had been, he would have had no difficulty in showing it. Indeed, he has left it to be inferred from his mode of cross-examining the governor, whose testimony has been taken, that he did not rely upon any organization, but upon the legality of that made by the governor. The committee, therefore, conclude that there was no other, and have no difficulty in deciding that to be clearly in violation of law.

The 292 votes which were returned from Buffalo county were, therefore, illegally counted by the canvassers for the sitting delegate, and should be deducted from his poll.

It is apparent to the committee, from the proof in the case, that the parties who perpetrated this fraud were well aware of it. Of the 292 votes returned and counted from Buffalo county, 238 of them were reported as having been polled at a place called "*Kearny City*," and the certificate accompanying the returns state that this place is "*in the county of Buffalo.*" This is not correct by the act laying out the county, as already quoted; the *south* boundary is the Platte river, so that no part of it extends south of that river. Yet it is in proof that "Kearny City" lies on the *south* side of the Platte! A fact which must have been known to all the persons engaged in perpetrating this fraud. Such men would have no difficulty in contriving to furnish a list of votes for the whole county as easily as those furnished for this place, and doubtless did the entire work from the same motive.

It is scarcely possible that Buffalo county could have furnished so large a vote as 292; to have done so it must have been the sixth county, in point of population, in the Territory, and must have contained at least 1,500 inhabitants.

The proof is, that there are "not over eight houses," and not "exceeding fifteen residents," and not "one acre of cultivated land or a farm-house," at or in the neighborhood of Kearny City; that at Nebraska Centre, the place named in the act as the county seat, there is only "one dwelling-house, one storehouse, one barn or stable, and one warehouse," one farm in cultivation, and one or two near by opening for cultivation; and at Centralia there was but a single individual. The sitting delegate does not offer to show any other settlements than these, and the committee are left no other alternative but to conclude that there are no others; if there had been it was his duty, after this proof made by the contestant, to have shown it. Hence, the whole of this vote of Buffalo county must be set aside as illegal and fraudulent in the opinion of the committee.

II. As to the votes from Calhoun county:

It is not pretended that Calhoun was an organized county, within the meaning of the statute. The act defining its boundaries is entitled "An act to *establish* new counties," &c., and it was, therefore, in the same condition precisely as Buffalo county; that is, the act authorized such steps to be taken, without additional legislation, as were necessary to its organization. Like Buffalo, it could have been organized by the proper application to the county commissioners or probate judge (no matter which) of the nearest county on the east. But nothing of this kind was done. On the contrary, it was attached to the county of Platte for election purposes, and constituted a voting precinct of that county; and as such voting precinct it was the duty of those who had charge of the election there to return the poll-books to the clerk of Platte county, whose duty it was, by law, to send an abstract of them to the governor. But this was not done. Instead of doing it, they sent the returns directly to the governor, and they were taken out of the post office by his private secretary, who opened and examined them, and then sent them himself to the clerk of Platte county, with directions to return them with the Platte county returns. This was manifestly a violation of law. The law of the Territory, as also of all the States, has pointed out a particular mode of making election returns, and has designated particular officers who shall open and inspect them. If they are opened and inspected by any others they are thereby vitiated; for if such a practice were tolerated innumerable frauds might be perpetrated, and the popular will defeated. By the law of Nebraska Territory the votes polled in Calhoun county could not be properly opened by any other persons than the probate judge and three disinterested householders of Platte county. Yet it is in proof that they were opened by the private secretary of the governor, and it is not proven or pretended that the probate judge, or any three householders of Platte county, ever saw them. On the contrary, it is proven that they were sent by the private secretary of the governor to the clerk of Platte county, and by him sent back to the governor. The clerk must have opened them himself; this is the necessary inference.

In the opinion of the committee, therefore, this violation of law vitiates the whole of the returns from Calhoun county. And the committee think that, for another reason, they should be set aside as fraudulent.

The contestant has proven by competent witnesses that the entire settlements in this county consisted of *two* families in the northwestern part, and *four* families in the southeastern part of the county, and that the whole voting population of the county does not exceed *six!* Yet there are 32 votes returned; 28 for the sitting delegate, and 4 for the contestant. One witness who has resided in the county swears that he does not know of a voting precinct in the county, or of an election being held. Another swears that he saw the returns in the clerk's office of Platte county, where they were sent by the private secretary of the governor; that he took from them the names of the persons who were represented as having conducted the election, and when these names were shown to the witness who had resided in that county, the latter swore that he *never heard*

of such persons! From the whole of the evidence on this point, the committee conclude that these returns were *forged* by some person; and they are supported in this conclusion by the fact that the clerk of Platte county has certified, since this contest began, that they "have been *abstracted*" from his office—a fact which goes to show that somebody had a motive for their concealment or destruction.

The committee think that as such proof as this has been made by the contestant, it was incumbent on the sitting delegate to show such facts as would rebut it, so as to set the matter right if it amounted to a misrepresentation. His not having done so ripens the presumptions they necessarily excite into convictions, and leaves the committee no other alternative than to conclude that the whole vote of Calhoun county is fraudulent, and should not have been counted.

The committee, in this view of the vote from Calhoun county, assumed it to be true, as sworn to by the private secretary of the governor, that this county is attached for election purposes to the county of Platte. But this is denied by the sitting delegate, who insists that it is not so attached, and it is in proof that the clerk of Platte county could find no record of a Calhoun county voting precinct in his office. This view of the matter leaves no doubt about the fraudulent character of the vote; for, if the county was not a voting precinct of Platte, it was evidently not organized, and could not legally vote at all. And besides, sending the return to the clerk of Platte by the private secretary of the governor, and its being opened by him, would vitiate it, as has already been shown.

III. As to the vote from Izard county:

The committee cannot avoid the conviction that the whole vote returned from this county is fraudulent. The vote returned and counted was 24, of which 21 were for the sitting delegate and 3 for the contestant. One witness, who resides on the main travelled road leading to this county, swears that he "never saw a settler of Izard county going to or returning from that county, or heard of one." Another, who visited the county last July, swears that he saw no evidence of settlement, no roads, nor any person who appeared to reside there; and that in travelling through the county he neither saw nor met any person. And a third swears that he has no knowledge of any settlements in the county, and has the opportunity of knowing if there were any. He says he has no doubt there are none at all.

This the committee consider to be competent proof. The non-settlement of a county could be proved in no other way; and, being competent, it so establishes the fact of their being no inhabitants in Izard county as to make it conclusive, inasmuch as the sitting delegate has offered no proof to the contrary. His not doing so leaves the inference a necessary and inevitable one, that the county was wholly without population. And having no population, it could not have been an organized county, and consequently no election could have been legally held there. The votes reported from there are therefore fraudulent, and should have been rejected by the canvassers.

IV. As to the votes from the precinct of Genoa, in the county of Monroe:

It is conceded that this precinct is "in the reservation of the Pawnee Indians," set apart for their occupancy by the United States. By the act of Congress organizing the Territory it is provided that the territory occupied as an *Indian reservation* shall not be considered a *part of Nebraska Territory*, but that all such territory shall be excepted out of the boundaries until, by arrangement between the United States and the Indians, the title of the latter shall be extinguished. No such arrangement as this having been made between the United States and the Pawnee Indians as to this reserve, it was no part of the Territory, and hence there could be no voting precinct legally established within it. The votes returned from there were therefore illegal and fraudulent, and should be rejected.

V. As to the votes from L'Eau Qui Court county:

The entire vote of this county was counted for the sitting delegate, it being 128 votes. A gentleman who represented the county in the legislature of the Territory swears that there are only from thirty to thirty-five votes in the county; and the witness swears that there are but two settlements in it, and that it is generally unsettled. The *only* witness whose testmony has been taken by the sitting delegate makes a statement to some extent contradictory of these, and speaks of five settlements in different parts of the county. At one of these he says there is only "a single family;" at another, "probably half a dozen voters;" at another, "three dwellings, and *may be more;*" at another, "one house;" and at the last, the county seat, "about twenty or twenty-five houses." He speaks also of having seen some emigrants going to two other portions of the county, but does not say whether or no they settled there; and he also says that the year before the county polled eighty votes. The committee conclude, from all the evidence, that there cannot be over sixty votes in the county, and that all the vote above that number is fraudulent; that is, that sixty-eight votes should be deducted from the number counted for the sitting delegate.

The fraud in this county is abundantly proven. Two of the witnesses visited the county after the election to procure a copy of the poll-book. They succeeded in obtaining it from the clerk, but it was taken away from them by a mob and destroyed before they could get out of the county, those who composed the mob declaring that they were parties to the fraud, and were resolved not to be exposed. The original poll-books were afterwards *stolen* from the clerk's office, and, doubtless, were also destroyed by the same men; but the witnesses saw enough of them to swear that they contained the names of Howell Cobb, Aaron V. Brown, "ten names of McRea in consecutive order," and several others whom they knew to be non-residents of the county.

This proof of the contents of this poll-book is entirely competent, since the loss of the original is shown, and shows such fraud as ought not to go unpunished by the proper territorial authorities. The committee, in view of them, are satisfied that they have made a liberal allowance for the vote of the county.

The committee deem it due to the sitting delegate to state their opinion upon the main preliminary points made by him.

He insists, first: That under the act of February 19, 1851, but one notice of contest could be served by contestant upon the sitting delegate, and that, having served that *one* notice, the power, under the act, is exhausted; and, whether sufficient or not, the contestant must abide by it.

Your committee entirely dissent from this position. In their view more than one notice may be served under the act of 1851, provided they shall be served within the time required by that act; and they may be treated as one notice, or as supplemental notices, or the contestant may, with notice to the opposite party, withdraw an insufficient notice and serve a sufficient notice in the place thereof. All the act of 1851 contemplates is fair notice of the subject-matter of contest within the time specified by the act itself. As the sitting delegate has had such notice, in the opinion of the committee, he has no ground for complaint.

Second: That there is no competent proof showing the result of the election.

The committee think otherwise. The proof upon this point consists of a copy of the abstract showing the result, as ascertained by the governor and the other canvassers, and filed by the governor in the office of the secretary of the Territory. The law of the Territory makes it the duty of these canvassers to count the votes and ascertain the result of the election. This must necessarily consist of the putting together of the several returns, summing them up, and thus ascertaining the result. When the result is thus ascertained, the governor is required to issue a certificate of election to the person having the

highest number of votes. He, of course, files away the result or abstract among the executive records as the evidence upon which his certificate is based. The returns of the clerks of the several counties would not be such evidence, wheresoever filed, for they show no result. They are mere abstracts of the poll-books returned from the precincts, and are sent to the governor that one general and final abstract may be made, showing the aggregate of votes and the result; and this final abstract is, from its very nature, a public record belonging to the executive department.

The act for the organization of Nebraska provides that the secretary of the Territory shall preserve all the acts and proceedings of the governor which pertain to his executive duties. He is, therefore, made the custodian of this abstract, and as the original must remain where it is, it is competent to prove its contents by a certified copy. That is done in this case, and the committee think it is the best evidence that could be offered.

The certificate attached to the abstract shows that the officers of the Territory put this construction upon the law; for it states that it was filed in the office of the secretary *by the governor*, which was, of course, done in obedience to what the governor considered his duty under the law.

Third. That the abstract of votes cannot be properly received, because the contest was closed on January 6, 1860, by a notice from the contestant that he would take no further testimony, and the abstract was afterwards procured from the secretary.

There is, as the committee think, nothing in this objection; there is nothing in the facts of the case to give it plausibility even. On the 6th of January, 1860, the attorney of the contestant served upon the attorney for the sitting delegate a notice to the effect that the contestant would "proceed no further for the present with the *examination of witnesses*," &c.; and in the notice it was said, "whether any further testimony shall be taken in his behalf is a question reserved for further consideration;" * * * "should it be deemed necessary to exercise it, a new notice to that effect will of course be given."

The committee understand this as having reference manifestly only to the "*examination of witnesses*." The whole context of the notice shows this, and its object is stated to be that the sitting delegate may have an opportunity of proceeding to take his evidence. It says that if any further evidence is taken, notice will be given. This, of course, refers to the taking of depositions; for no notice is necessary to obtain a certified copy of a record. Suppose the contestant had notified the sitting delegate that on a certain day he would apply at the office of the secretary and demand a certified copy of the abstract; what advantage could it be to him? The secretary, in making and certifying the copy, is not a witness, and could not be cross-examined. He performs the whole duty of making and certifying the copy without uttering a word; and the sitting delegate could not have interposed a valid objection to his doing so, for all citizens have a right to such copies of the public records. The argument that such a notice is necessary to obtain a record is frivolous.

But it is said that the sitting delegate is deprived of the opportunity of showing that this abstract is false. He does *not allege it to be false*. If he did, the committee would with pleasure have given him the opportunity to prove it so. But this paper was sent to the House by the judge in Nebraska before whom the testimony was taken, sealed up with the other papers, and was along with them referred to this committee on the 16th of February, 1860. The order to print was made on the 23d of February, 1860. The sitting delegate was bound to know, and might have known, (if he did not know,) with reasonable diligence, that this abstract was among the papers before the probate judge and your committee all the time. If he had desired to allege anything against its validity or truthfulness, it was his duty to have brought it to the notice of the committee and House, and have asked for permission to substantiate his accu-

sation by proof. But he has done nothing of this kind, and only argues against the certificate that he should have had notice when it was obtained, since if he had had such notice he *might* have shown it to be false. The committee are unable to appreciate the force of this argument, but consider the paper, having reached the House and committee regularly, together with the other papers, as competent proof. They consider the seal of the secretary as giving his certificate the import of absolute verity, and decline to impeach it except in a direct mode. As the sitting delegate has made no such case as involves an inquiry into its validity, the committee have declined to prosecute a collateral one.

Fourth. That the evidence has not been taken before a proper officer, within the contemplation of the act of 1851.

The act of 1851 provides that depositions may be taken before justices of the peace, notaries public, or judges of courts of record. In this case they were taken before a judge of a court of probate in Nebraska, and it is insisted by the sitting delegate that a court of probate is not a court of record. The committee think differently. Such a court can do nothing without a record, and from the very nature of its duties it must be a court of record. But if it were possible to doubt about such a position, the statute of Nebraska Territory has, in so many words, declared courts of probate to be courts of record.—(Laws of Nebraska, 1855, page 119.)

Other technical objections were made by the sitting delegate, which are so immaterial as to render any reference to them wholly unnecessary.

The committee consider the case of the contestant clearly and abundantly proven, and, from the absence of any contrary proof on the part of the sitting delegate, are compelled to regard the contestant as entitled to the seat. The frauds are palpable; so much so as to require that they shall be rebuked by the House as emphatically as possible. If such conduct should be tolerated, it would most seriously assail the integrity of the ballot-box.

The result to which they have come may be summed up, therefore, as follows:

Estabrook's whole vote	3,100
Daily's whole vote	2,800
Estabrook's majority	300

Illegal votes counted for Estabrook:

Buffalo county	292
Calhoun county	28
Izard county	21
L'Eau Qui Court county	68
Genoa precinct, Monroe county	20
Total of illegal votes	429

Illegal votes counted for Daily:

Calhoun county	4
Izard county	3
Genoa precinct	3
Total of illegal votes	10

There should be, therefore, deducted from the 3,100 votes counted for the sitting delegate, 429 illegal and fraudulent votes, which will reduce the whole vote cast for him to 2,671; and from the 2,800 votes counted for the contestant, there should be deducted 10 illegal and fraudulent votes, which will make his whole vote 2,790, and this gives to the contestant a majority of 119 votes.

The committee, therefore, recommend the adoption of the following resolutions:

Resolved, That Experience Estabrook is not entitled to the seat as delegate from the Territory of Nebraska to the thirty-sixth Congress of the United States.

Resolved, That Samuel G. Daily is entitled to the seat as delegate from the Territory of Nebraska to the thirty-sixth Congress of the United States.

The debate in the House was brief. The following extract elaborates a point raised in the report:

Mr. DAWES. I do not rise, Mr. Speaker, for the purpose of debating the merits of this contest, but to offer a few remarks in reply to the particular motion the gentleman has made to recommit this case to the Committee of Elections. I have no desire, and I think I speak the feelings of the entire committee, to deprive the sitting delegate of the largest possible opportunity he may in good faith desire for a hearing upon the merits of this case. The history of the case in the committee-room, and as it appears upon the records, is such that I am confident the House will justify the committee in saying they have permitted the sitting delegate to enjoy as large an opportunity for the preparation of his case, and for the argument of it, as has been allowed to any gentleman situated as the delegate from Nebraska is at this time. He has taken no testimony whatever, with the exception, perhaps, of an unimportant deposition. He placed his omission to take this testimony entirely upon this single fact: that notwithstanding the contestant had taken testimony, showing what appeared to the whole committee—for there is no minority report in this case so far as I know—one of the grossest instances of fraudulent voting that has ever come to our knowledge. I say, although the contestant had examined witnesses to substantiate these facts to an extent that no one on the committee has desired to controvert them, yet the sitting delegate omitted entirely to take any testimony on the subject, simply because, as he says, he supposed the contestant had made a blunder, which would be fatal to his case, and that he could not have a hearing upon the testimony. He says he went upon that supposition, and was so advised by his counsel; and therefore whatever evidence there might be, showing the frauds by which his election was obtained, any evidence to controvert such facts would be needless to him, because he supposed the contestant had committed the fatal blunder of having omitted to obtain from the secretary of the Territory of Nebraska an official statement of the majority by which the sitting delegate was returned as elected, until after he had given notice to the sitting delegate that he would take no further testimony of witnesses. Therefore, whatever frauds might be shown, he did not seem to have the least trouble about it; he did not seem to be sensitive at all with reference to the evidence produced by the contestant, that whole counties, without a single vote in them, had been returned with majorities ranging from 25 up to 292 for him.

So long as he believed the contestant had made this fatal blunder of not showing his official majority, he was quite satisfied to let the imputations of fraud go uncontradicted. He seemed to have continued in that satisfied condition of mind until, when summoned before the committee, he found the official certificate of the secretary of the Territory among the records, and also found that it was an established precedent in the House that official papers could be produced at any time. Nevertheless, the gentleman went to the hearing before the committee upon that state of facts, understanding just what the testimony was, relying upon his ability, as he said in his memorial to the House, to convince the committee that they ought to reject the official certificate of the secretary of the Territory of Nebraska, notwithstanding all the precedents were to the contrary, and notwithstanding in the last Congress a certificate precisely like this was admitted in the case of Vallandigham and Campbell upon full argument. Yet, he says, relying upon the fact that he was addressing lawyers, he thought he could convince nine lawyers that, because the contestant had fallen into what he himself supposed was a blunder, therefore they should reject and disregard all his accumulated testimony, showing beyond controversy the fraudulent processes by which the sitting delegate was returned as elected by a majority of 300.

Well, having gone before the committee, and having argued that point as long as he desired, and the committee having patiently, I think he will say, listened to all his arguments, they, following all the precedents of Congress upon the subject, received the certificate of the secretary of the Territory. Here is the certificate of the secretary of Nebraska Territory:

"SECRETARY'S OFFICE, OMAHA CITY, *January* 19, 1860.

"I certify that the foregoing abstract of votes polled at the general election, held in this Territory on the 11th day of October, A. D. 1859, is a true and correct copy of that abstract, as returned to me by the governor and board of canvassers for the Territory aforesaid.

"In testimony whereof, witness my hand and the great seal of the Territory of Nebraska [L. S.] hereunto affixed. Done at Omaha, on this the 19th day of January, A. D. 1860.

"J. STERLING MORTON, *Secretary of Nebraska.*"

By that abstract it appears that the sitting delegate had three hundred majority, and the evidence is incontrovertible that more than that number of votes counted for the sitting delegate were bogus. The sitting delegate stated, as his ground for asking a continuance, that if he had known that his certificate would be admitted he would have taken testimony to controvert these frauds. He does not controvert the certificate.

The House adopted the resolutions of the committee without a division. The brief debate in the House, preceding the vote, will be found in volume 41, pp. 2180, 2181, 2182.

THIRTY-SIXTH CONGRESS, FIRST SESSION.

BLAIR *vs.* BARRETT.

Where judges of election neglected to take the prescribed oath of office and were implicated in frauds in conducting an election, held that the sitting member may be required to prove that they had conformed to law before the vote is counted.

Ex parte affidavits taken after the parties had been fully heard on all the points involved in the case were rejected.

The statement of a voter himself, in reference to his qualifications, admitted as evidence.

The city government of St. Louis having ordered a census to be taken with statistics of nationality and naturalization, the committee received the census and the testimony of the census-takers.

IN THE HOUSE OF REPRESENTATIVES,

MAY 22, 1860.

Mr. DAWES, from the Committee of Elections, made the following report:

The election here contested was held by ballot on the 2d day of August, 1858. The district is composed of the city and county of St. Louis. The official canvass disclosed the following result of the votes, viz:

For J. R. Barrett, 7,057 votes; for F. P. Blair, jr., 6,630 votes; for S. M. Breckinridge, 5,668 votes—showing a plurality for the sitting member over the contestant of 427 votes. But a clerical error in one of the precincts gave to Mr. Blair 180 votes more than the actual poll in that precinct; so that the actual plurality of Mr. Barrett over Mr. Blair was 607 votes. A plurality elects. The contest has been carried on in conformity with the provisions of the act of February 19, 1851. The proofs are very voluminous, filling 953 pages of printed matter, and are to be found in Miscellaneous Document No. 8. The committee heard both the contestant and the sitting member, by themselves and by counsel, at great length, though no longer than the magnitude and complication of the case seemed to require. The briefs submitted on each side have been printed by order of the House, and may be referred to for the legal views which are urged by the respective parties.

The notice of contest which accompanies the proof contains nineteen grounds of contest. The answer of sitting member, which may be also found with the proofs, after denying specifically the several grounds of contest contained in the notice, makes, in turn, fifteen distinct charges of the grounds upon which the claim of the contestant is disputed.

The manner of voting is peculiar to this district. It is provided by law that "at all elections by ballot it shall be the duty of the judges of election, in receiving the ballots and registering the names and number of the votes, to place the number which shall be recorded opposite the voter's name on the list also on the ballot offered by him before depositing the same into the ballot-box."

The judges are required, after certifying the result, to transmit the same, together with one of the poll-books, to the clerk of the county court, and provision is made for compensation to them for their services in conducting elections and returning the poll-books and ballots to the county clerk's office. This peculiar statute provision, if faithfully executed, renders it an easy matter to ascertain with certainty, whenever it is necessary, for whom every voter in the district cast his ballot. It is properly entitled "An act to facilitate the detection of fraud in elections," and its title indicates clearly enough the purpose of its enactment. A comparison of the number on each ballot, at any time after the election, with the corresponding number on the poll-book, will, if the poll-books have been honestly kept, disclose against that number the name of the person who deposited that ballot; and when the ground of contest is that the votes are illegal, nothing but the qualification of the voter is left for further inquiry. After the notice of contest was served upon the sitting member, charging that great numbers of illegal voters cast their ballots for him, the contestant made application to the clerk of the county court for liberty to inspect the numbered ballots cast at this election. This application was resisted by the sitting member, and the county court passed an order restraining the clerk of the county court from allowing any such inspection. Subsequently the judge of the circuit court, to whom the contestant applied to take proofs, under the statute of February 19, 1851, which expressly clothes such judge with power to require of any person, under severe penalties, the production of any "paper or papers in his possession pertaining to said election," peremptorily commanded the production of these ballots, and they have thus been made a part of the proofs, and are to be found in said document No. 8, before referred to. The statutes regulating the election of members of Congress require that the judges of election shall, before entering upon the duties of their office, take an oath that they will faithfully perform those duties, and that "a certificate of their qualification shall be returned with the return of the votes." To be a qualified voter in this district, one must be a free white citizen of the United States, of twenty-one years of age, a resident of the State of Missouri one year next preceding an election, the last three months of which being in the county or district in which the vote is offered. A person otherwise qualified may vote in a township of which he is not a resident on taking an oath that he has not voted and will not vote in any other township during that election.

The evidence discloses a large and wholly unexplained increase of the aggregate vote for member of Congress at this election over that cast at a warmly contested and spirited canvass for the same office at the last election, two years before. At that election the aggregate vote was 13,865, while at this it swelled to 19,356—an increase of 5,491. It further shows that while Mr. Blair, who was a candidate at both elections, and the candidate of the American party, each received the full amount, and a slight increase of the vote cast for them respectively at the last election, nearly the entire amount of this great accession of votes, viz: 4,776 votes, was cast for the sitting member over those cast for the candidate of his party at the last election. The 13,865 votes cast at the last election were divided as follows: For Mr. Blair, the candidate of the "free democracy," 6,035 votes; for Mr. Kennett, the candidate of the American party, 5,549 votes; for Mr. Reynolds, the candidate of the "national democracy," 2,281 votes. At this election the 19,356 votes were cast as follows: For Mr. Blair, 6,631 votes; for Mr. Breckinridge, the candidate of the American party, 5,668 votes; and for Mr. Barrett, who was the candidate of the national democracy, 7,057 votes. Thus it will be seen that while the vote for Mr. Barrett over that cast for the candidate of his party at the last election had increased 4,776 votes, there had been no corresponding falling off either in the vote of Mr. Blair or in that of the candidate of the American party. On

other hand, the vote for these two gentlemen had also increased—that of Mr Blair 415 votes, and that of Mr. Breckinridge 119 votes. While a moderate increase of votes is readily accounted for by the natural increase of population and growth of the city, yet so great an increase in two years must, in the opinion of the committee, if honest, be traceable to some known, distinct, and palpable cause which might, if it existed, have been easily pointed out and made apparent during the investigation. It is evident that the large accession of votes to the sitting member over those cast for the candidate of his party at the previous election did not result from a change of party relations among the voters. If it had been, there would have been a corresponding falling off from the vote for one or the other of the candidates of the other parties, yet they each not only maintained but increased their former vote.

If such increase had been attributable to increase of population, it must have been, under the law requiring a year's residence in the State before voting, from an addition to the population which had arrived in the city a year previous to the day of the election; if from out of the State or from some other part of the State of Missouri, three months at least before that day. The presence of a new voting population of 5,000, with all the families, and other indications of their existence which move with them wherever they go, and stop with them wherever they abide, could hardly escape notice for a year or even three months. It could hardly be expected, either, that any such actual and *bona fide* accession to the voting population would have cast its entire strength for the candidate of one party alone. To some extent such increase would naturally be expected to distribute itself somewhat among all parties. The committee have not been pointed to any instance elsewhere of so great an increase to the voting population of such a territory in so short a time, without any known cause or source, or special indication of its presence, and all of one political faith, and casting its first vote in a body for one of three different political candidates all at the same time and place equally active in canvassing for votes. This district is divided into thirty-five election precincts or sub-districts, and any honest increase of votes arising from natural increase of population would generally find itself distributed among them all; yet it is nearly all found in seven or eight out of the thirty-five.

These remarkable features of this case, disclosed in the outset, led the committee early to direct a most scrutinizing inquiry into the manner of voting, the qualification of voters, the conduct of the judges of elections, and of others in these precincts. The evidence shows that great irregularities existed at nearly all of them; and just in proportion as these irregularities were frequent and glaring, did the increase of vote for the sitting member over the vote cast for the candidate of his party two years before show itself. In many of them it does not appear that the judges took any oath of office before proceeding to open the polls. One judge could neither read nor write, had been convicted by a jury of a conspiracy to cheat; another was deaf; a third threatened with violence those who sought to challenge votes, and, instead of refusing to receive the votes of men who declined to be sworn as to their qualifications, as was his duty, endeavored to persuade them to vote without. Men unknown in the precinct where they offered to vote were permitted to cast their ballots without question, and without first taking oath, as the law requires, that they "had not voted and would not vote in any other precinct in the district." Violent and tumultuous crowds surrounded the polls, and at times had such possession of them, and power over the judges, as to render it almost, if not quite, impossible for any one to approach the polls or cast his vote, unless he carried a ballot for the sitting member. Scenes of violence occurred about the polls; altercations arose, and blows passed between the judge of the election and the challenger outside. Men, strangers in the precinct, openly proclaimed that they "had come [illegible] to make every Irishman vote the Barrett and Hackney ticket," and

were themselves permitted to vote the same ticket without question; public officers, who were upon the same ticket with the sitting member, thus voted, mingled with, and countenanced and encouraged these proceedings. One of the judges of the county court, which afterwards passed an order forbidding its clerk to permit the contestant to inspect the ballots thus cast, was upon the same ticket with the sitting member, and received with him the votes thus cast, and then subsequently attempted their concealment. Men temporarily employed upon public works, and having no legal residence in the district, were led by their employer, to the number of twenty-five or thirty, in a body to one poll to vote, and, when challenges and objections prevented more than five or six of them from casting ballots for the sitting member at that precinct, the remainder were taken to another precinct, and, in the language of their employer, "put through." Open and shameless proclamation of a $1 25 for a vote for Barrett was made in the crowd about the polls. Liquor was freely used, and booths for its sale or gratuitous distribution were kept in violation of law in the vicinity of the polls. And when a man in the early part of the day, upon being brought to the polls refused to "swear in" his vote, was taken away and plied with liquor, and again brought up and again refused to swear in his vote, was again taken away, and late in the day was brought up a third time stupefied with liquor, and the judges administered the oath to him in that state, and took the vote which he had twice before refused to swear he was qualified to give. Voters were interfered with when in the act of voting their choice, and the ballot snatched away and one for the sitting member put in its place. As if preparatory for, and in anticipation of, these scenes at the polls, large numbers of men were employed a few days previous to the election upon the county roads, among whom there was the understanding that they were expected on the day of election to vote the ticket upon which was the name of the sitting member and of Judge Hackney, who subsequently attempted, by the authority these votes gave him, to shield with the power of his court these same votes from investigation. The evidence shows that these men thus employed were strangers, without residence in, and unknown to those who were residents in, the precinct and best acquainted with its inhabitants. One judge, in the face alike of his duty and the constitution of the State, openly declared in the hearing of the crowd at the polls, which seemed already sufficiently inclined to avail itself of any such suggestion, that "if a man who had worked six months on a railroad in Missouri hadn't a right to vote he didn't know who had." These laborers and others recently known in Illinois and elsewhere, but not known at the place of voting, were seen immediately after the election taking leave, with carpet bag in hand, and have disappeared altogether from the vicinity. These irregularities and violent proceedings were shown to exist to a great extent in the following precincts, viz:

The 32d precinct—Gravois coal mines.

The 11th precinct—Carondelet.

The 28th precinct—Eastern poll, ninth ward.

The 29th precinct—Western poll, ninth ward.

There were the same scenes at other precincts, though perhaps not as glaring as at those just enumerated. An examination of the poll-books and abstract of votes at these precincts, which are a part of the proofs, discloses evidence of these irregularities and the facility they afforded for fraudulent voting. The conviction is forced upon the committee that this facility was eagerly and largely availed of, if it were not the cause and temptation to much of the fraudulent voting. In several of these precincts it does not appear that any oath had been taken by the judges of election, which, if nothing else, might be supposed to be some check upon a disposition to disregard or overlook the requirements of law. There is likewise the same omission in some instances of any evidence that the clerks, whose duty it is to keep a record of all the votes cast [illegible] swo-

according to law. Poll-books coming without these sanctions from out the tumultuous scenes and angry strife which reigned at the precincts here mentioned, in which the officers who kept them as well as the outside crowd participated, fail in the outset to command that confidence in their accuracy which ordinarily attaches to the proceedings of public officers. The committee find on inspection, in frequent instances, too many to leave it to be imputed to accident or mistake, ballots with the same number reported upon them which had previously been put upon other ballots and counted in the result. Whenever this is done, it must have been either because the voter cast two votes at once, with the connivance of the judge and clerk, who put his number upon the two ballots at the time they were cast, or some one having access to the ballot-box, and knowing what number had already been voted, puts upon a ballot a number already used, and drops it into the box in the expectation that the ballot will be counted and the repetition overlooked in the general result. Such instances could not arise from mistake of the judge or clerk in honestly putting upon one voter's ballot the number which they had previously used upon another, because the same number thus put upon the ballot must also be put against the name of the voter upon the poll-books, and there would consequently appear upon the poll-books the names of two or more different voters with the same number prefixed to them, and the mistake would be harmless. It is difficult to explain this consistently with the integrity of all the officers conducting the election. Such was the looseness and irregularity existing at many of the polls, that any one having access to the ballot-box could accomplish it all. Such evidences materially impair that confidence which the committee would gladly have placed in these returns, and were not without their effect in further investigation of the character of votes which were challenged as fraudulent. The poll-books show that the same person cast more than one vote, sometimes more than two, sometimes at the same precinct, and sometimes at different ones in the city, multiplying in this way his vote manifold in the general result. A comparison of the vote in these four precincts in 1856 and 1858, the election here contested, will show which candidate profited by the fraudulent voting, if any existed. The following is a table showing the vote for each candidate at both elections in each of these precincts:

Comparison of the vote for representative to Congress in 1856 *and* 1858, *in four precincts challenged by the contestant.*

Gravois precinct.

1856—Kennett, (American,) 47; Reynolds, (democrat,) 4; Blair, 4.
1858—Breckinridge, 24; Barrett, 153; Blair, 7.

Carondelet.

1856—Kennett, 114; Reynolds, 44; Blair, 104.
1858—Breckinridge, 66; Barrett, 286; Blair, 159.

East precinct, 9th ward.

1856—Kennett, 240; Reynolds, 47; Blair, 271.
1858—Breckinridge, 234; Barrett, 492; Blair, 196.

West precinct, 9th ward.

1856—Kennett, 31; Reynolds, 102; Blair, 267.
1858—Breckinridge, 46; Barrett, 418; Blair, 224.

Total—1856—Kennett, (American,) 432; Reynolds, (democrat,) 197; Blair, 646.
1858—Breckinridge, (American,) 370; Barrett, (democrat,) 1,349; Blair, 586.

From this table it appears that, while there was no corresponding falling off of the vote of either the American candidate or Mr. Blair, (the one having lost 62 votes, and the other 60 votes only,) there was an increase of votes for the sitting member over that cast for the democratic candidate at the last election, in these four precincts alone, of 1,152 votes—nearly twice his whole majority. There was an absolute increase in these four precincts alone of 1,030 votes in an aggregate vote of only 2,305, all of which were cast for the sitting member. Had there been a corresponding increase in each of the thirty-five precincts in this district, the whole vote of the district would have been 26,453 votes against 13,765 at the last election, or a few votes only short of double. The whole vote cast for the sitting member would have been 16,458 against 2,281 votes cast for the candidate of his party at the last election—an increase of more than seven-fold—and the majority for the sitting member would have been 10,984 votes.

The committee have sought by this brief summary to present to the House, as clearly as they are able, without reciting in detail the evidence upon which the contestant urged before them that the entire polls in several of the precincts to which that evidence more particularly applied, viz: the two precincts of the 9th ward, the "Harlem House" precinct, the Carondelet precinct, and the "Gravois coal mine" precinct, should be rejected as so utterly and entirely unreliable that the truth cannot be deduced from them. The precedents of Congress justify the rejection of polls where the judges of election or clerks neglect or refuse to take the prescribed oath of office.—(See McFarland *vs.* Purviance, Contested Election Cases, page 131; same *vs.* Culpepper, ibid., 221; Easton *vs.* Scott, ibid., 281.) Of the precincts above named, there was no evidence returned with the return of votes, nor before the committee in any shape at the hearing, that the judges of election were sworn in either the Harlem House precinct or the Gravois coal mine precinct; nor was there any in respect to the G. Sappington precinct. Had it appeared from the evidence that the election had been fairly conducted at these precincts, and there were no traces of fraud, no taint of the ballot-box, the committee would not have been willing to have recommended a rejection of these polls. The honest electors should not be disfranchised and their voice stifled from a mere omission of the officers of election to take the oath of office; but where, as in the case of the election districts now under consideration, gross frauds are made to appear, some of them of such a character as necessarily to complicate the officers of the election themselves; where the whole ballot-box becomes so tainted as to be wholly unreliable, and it is next to impossible to ascertain what portion of the poll returned is an honest vote; when one judge has been convicted by a jury of a conspiracy to cheat, another can neither read nor write, a third is so deaf as to be incompetent from physical infirmity to act; where one mingles in the fights of the crowd, encourages illegal voting, forgets the obligations of his position in the zeal and passion of the partisan, it is believed by the committee that they could not do less than require of the sitting member to prove that these officers had conformed to the law before the votes they had (under these circumstances) returned should be counted. In this connexion they cite a late case of contested election in a court of law, the case of Mann *vs.* Cassidy, for the office of district attorney in the city of Philadelphia, at an election held October 14, 1856, contested in the court of quarter sessions in that city. The facts in that case, as summed up by the presiding judge, are so parallel with those disclosed in this case that the committee take the liberty to append them to this report in an appendix, marked A, and solicit the attention of the House thereto. A reading of the evidence, as thus summed up, and as contained in the proofs in this case, would almost lead to the conclusion that the one had been taken as the pattern of the other. After summing up the testimony at length, the judge concludes: "As the case

now stands before us we should be derelict in our duty did we not unhesitatingly express our conviction that the acts of the officers in the election divisions to which we have referred, in the receipt and recording of votes, are so utterly and entirely unreliable that the truth cannot be deduced from any records or returns made by them in relation thereto." And he adds: "Had we not erased from the petition the specifications alleging gross frauds and irregularities on the part of the election officers in the divisions referred to, a different course would certainly have been adopted. The entire proceedings were so tarnished by the fraudulent conduct of the officers charged with the performance of the most solemn and responsible duties that we would not only have been abundantly justified, but it would have been our plain duty to throw out the returns of every division to which we have referred."

This language should not be applied indiscriminately to all the election officers in the precincts under consideration; there were honorable exceptions; but the election at these several places was so far under the control of men to whom this language is fitly applied, that the polls justly come under this condemnation. The committee are aware that it is sometimes held that public officers are presumed to be qualified, and to have taken such oaths of office as the law requires, and must be taken and deemed to have done so, in the absence of proof to the contrary; but in this case the law of Missouri expressly requires that "a certificate of their qualification shall be returned with the return of the votes." It was expressly charged as a ground of contest that they had not been sworn, (see 19th charge.) It would have been a matter of the greatest ease to have proved the fact, if it had been a fact, by summoning any one of these officers as a witness; yet the sitting member, though he called many other witnesses to other points, at no time examined either of the fifteen men officiating at these precincts, or any other person, as to this fact.

More than a month after the hearing before the committee had closed, just forty days after the parties had been fully heard upon all the points involved in the case, the sitting member presented to the committee two *ex parte* affidavits, which, if true, would show that the judges of election at one of the precincts of the fifth ward, and at the Harlem House, were actually sworn, and asked the committee to either receive them as evidence or grant a delay and authority to put the evidence in the form of depositions. But it appeared strange to the committee that when the disqualification of judges had been made a special ground of contest nearly two years before, and a thousand pages of evidence had been taken, and the person who, by these affidavits, administered the oath of office had been a witness for the sitting member, and had never been asked the question, and the parties had been heard before the committee at great length and to their content—it appeared strange that forty days after all this had been suffered to elapse before the existence of any such evidence had been suggested. The committee declined to receive the *ex parte* affidavits, and saw no reason for granting further delay. It will be seen, by the conclusion at which the committee arrived, that the result would have been the same, whether the affidavits were admitted or not. As to the precinct at the court-house in the fifth ward, there was no allegation in the notice of contest that the judges were not qualified, and the poll is not rejected by the committee; and whether the Harlem House precinct be rejected or not, the result would be the same. But the offer of these affidavits to show that the judges at a precinct not contested on this ground, and another small one not affecting the general result, were qualified; and the omission of any such offer as to those precincts which would control the result, and were made a special ground of contest because of this omission to qualify, has forced the conclusion upon the committee that no evidence could be produced to show that the judges of election at the Gravois coal mine precinct, and of the G. Sappington precinct,

were ever qualified, and that the omission to return a certificate was not accidental.

Yet, had it been made to appear that everything else had been regular and fair at these polls, could the committee have brought themselves to believe, from the evidence in the case, that the returns had expressed the wish of the people at these points, untainted by fraud or fraudulent votes, they would have been constrained to have given the sitting member the benefit of such presumption in the absence of a compliance with the law, or the benefit of the principle that the acts of officers *de facto* are valid as regards the public, and third persons who have an interest in their acts, which has lately been applied to a case of this kind in the State of New York? (See The People *vs.* Cook, 14 Barb. Reports, 245.)

In the case of Joseph Draper *vs.* Charles C. Johnston, in the 22d Congress, (Contested Election Cases, p. 701,) the Committee of Elections state the law, as your committee believe correctly as follows:

> The neglect by the sheriff or other officer conducting the election to take the oath required by law vitiates the poll for the particular precinct or county, and the whole votes of such precinct or county are to be rejected. The legal presumption is, that the oath required has been taken, every officer being presumed to have done his duty, and that the *onus* is thrown upon the party taking the objection to show the neglect or omission; but as the law of Virginia requires that the oath shall be duly returned by the magistrate before whom it is taken, and filed in the clerk's office, a certificate from the clerk that no such oath is filed will be sufficient *prima facie* (notice of the objections being previously served upon the opposite party) to throw the burden of proof upon the party claiming the vote.

In this case the law of Missouri requires that the certificate of the qualification of the judges of election shall be returned with the return of the votes. An inspection of the record shows no such return at the precincts now under consideration. It was distinctly alleged, as a ground of contest, that these judges had not taken the oath, and the committee had come to the conclusion that the burden was upon the sitting member, claiming these votes, to show that these officers had actually taken the required oath, or to have shown affirmatively that the votes he asked to have counted for him at these precincts, if the officers were not qualified, were actually given by *bona fide* voters; and he, not having shown either the qualification of the officers or the fairness of the vote, but the contrary appearing, the votes at these precincts, viz: Gravois coal mines, G. Sappington's house, and Harlem House, are rejected.

The contestant further charged, as a ground of contest, "that in every precinct in the city there were illegal votes given to you [the sitting member] by minors, non-naturalized foreigners, non-residents, persons having no sufficient residence, and that there was also double voting for you, and voting for you by persons under fictitious names, there being no such persons in fact residing in this congressional district."

The sitting member, on the other hand, in his answer, among other charges, makes a similar one, in respect to illegal voting, against the poll of the contestant, nearly as broad and in much the same language.

These charges imposed upon the committee the labor of investigating the entire poll-books of the district, and of examining into the qualifications of voters in every one of the thirty-five precincts. The evidence is voluminous, thrown together at the printing office in a book of near one thousand pages, without index or order. Nice questions of law and fact were involved in the conclusions at which the committee arrived, upon which learned and lengthy arguments were submitted by the parties and their counsel. The committee are conscious of their liability to mistake in the examination of so much testimony, and to err as to its legal bearings and just weight. They have given to it much time and their just judgment; and now, invoking an attentive perusal by the House, for itself, of the evidence which is before them for their consideration as well as the committee, they submit their conclu-

Of the voters whose qualifications have been challenged on both sides, and which the committee decided to reject as disqualified, the evidence touching some of them was from their own lips directly, either testified by themselves or by others as their admissions. This latter testimony was admitted in the case of Vallandigham *vs.* Campbell in the last Congress, and has been admitted in many other cases in this country and in England, and was not strenuously opposed in this case. Many voters were charged to be non-residents—some of the State, and more of the particular precinct in which they voted. The very nature of the charge shows the difficulty of the proof. It involves to a great extent proof of a negative respecting persons whose names are not even known; and, except in the few instances where there may be a personal acquaintance with the man in another State or in a distant part of the same State, the proof can hardly be, from the nature of the case, of a positive and direct character. In these cases the committee based their conclusion upon evidence that these men had never voted in that precinct before; were strangers to the old residents of the precinct, to individuals who had acted as judges and clerks of election for a great number of years; had no home or business in the precinct known to those best acquainted with its homes and business, and that they have disappeared from the day of election, their whereabouts not having been discovered since even by census takers. Some of these precincts are small, casting ordinarily but two or three hundred votes; and men living within their limits for ten, fifteen, and twenty years see the vote doubled and sometimes tripled by the presence of men seen for the first and last time on the day of election. With this evidence on the one side, so easy of rebuttal by the production of the voter, if a resident, or of some one who knew him to be a resident, yet left uncontradicted, the committee could come to no other conclusion than to reject all such votes as illegal.

Another class of voters challenged was unnaturalized persons, those of not sufficient residence in the State or precinct, or minors, or having some other disqualification, though not unknown to the witnesses, as in the case of non-residents. As to the qualification of this class of voters, the admission of the voter, the testimony of his acquaintances and family, of those who had heretofore acted as officers of election, and circumstantial testimony of various kinds, was admitted for what it was worth. In addition to this testimony was that from another source, which was strenuously resisted by the sitting member on two grounds: first, that evidence from this source was not competent in an investigation of this kind; second, that the method of producing it before the committee was in conflict with the well-established rules of evidence. The evidence alluded to was this: On the 13th day of August, 1858, the city council of St. Louis passed an ordinance to take the census of the city provided by its charter and previous ordinances. A copy of this ordinance will be annexed to this report. For this purpose the city was divided into districts, and census-takers were appointed for each census district. They were instructed, in addition to an enumeration of the inhabitants, to ascertain and report various other matters of statistical information; among which was the nationality of the inhabitants found within their respective precincts, and whether naturalized or not, if foreign-born; how long resident, &c. It was to the evidence which the reports of these census takers disclosed that the sitting member strenuously objected. First, because under no circumstances could they be evidence of facts which they purport to contain; and, secondly, because of the manner of bringing that evidence before the committee.

The committee answer, that, so far as the census takers themselves were witnesses, testifying to the facts contained in their report obtained by themselves, which was the case in very many instances in which this kind of testimony was offered, it is the ordinary case of men making memoranda, or writing down what they know, and then coming into court and testifying to the facts

thus acquired, refreshing their memory from the paper thus made out by them. Nor is there any objection to others comparing the poll-books with those memoranda thus verified, and testifying to the result of the comparison. But these reports of the census takers, now in the archives of the city, are official documents, and are *prima facie* evidence of the facts they contain. They are like the land lists of Virginia, which are *prima facie* evidence that the men whose names are in them, purporting to be land owners, were voters, (see Robert Porterfield *vs.* William McCoy, Contested Election Cases, page 267; George Loyall *vs.* Thomas Newton, ibid., page 520;) or the list of taxables in Pennsylvania, which were used as evidence for the same purpose in the case of Mann *vs.* Cassidy, before referred to, and votes of men not found on these lists rejected. And the poll-books are always *prima facie* evidence, both of the fact that a man has voted and of the qualification of the voter, without evidence to rebut it, stand as the fact. (See Porterfield *vs.* McCoy, Contested Election Cases, page 267, and 1st Peckwell on Contested Elections, English, page 208, and 2d Peckwell, page 270.)

Nor is there any well-grounded objection to the manner of producing this testimony before the committee; so far as it was brought before the committee by the census taker himself, when testifying to the facts contained in his report, the objection has been already sufficiently answered. And all the evidence so introduced has been from men swearing that the paper exhibited by them is an exact copy *pro tanto* of the census return. In some instances the commissioner taking the deposition has annexed the identical paper thus sworn to to the deposition, and in others he has himself instead written out their contents in the answer of the witness. These extracts from the reports of the census takers, used by the committee, thus become *pro tanto* examined copies. And this is one method of producing copies laid down in the elementary books. (See Greenleaf on Evidence, 1st vol., secs. 483, 484; 1 Phillips on Evidence, p. 432.) In the case of Vallandigham *vs.* Campbell, decided in the last Congress, the secretary of state examined the contents of the returns from the several counties composing the third congressional district of Ohio, computed an abstract of them all, and then certified, under his official seal, not a copy of any record return on file in his office, but the abstract, which had been the result of his own examination of the contents of another paper or papers, and that certified abstract was used as evidence. This was carrying this point much further than the admission of the evidence here offered. The sitting member has also resorted for evidence, both in challenging votes and in rebutting testimony offered by contestant on other points, to this very census, to the introduction of which he objected. The committee, for the foregoing reasons, admitted the testimony, giving to it such weight as its own intrinsic merit and other corroborative testimony in the case, in their opinion, entitled it.

The testimony derived from the census was greatly strengthened and corroborated by testimony from other and entirely independent sources, and it, in turn, corroborated other documentary and oral testimony, showing the accuracy and reliability of each. It gave the names, streets, and number of a large number of persons put down as "not naturalized," with "first papers only;" "not a resident in the State a year," or "not in the precinct three months," &c. Other witnesses, old citizens of the precinct, familiar with its voters, judges or clerks of elections in many previous years, made out similar lists from the poll-books and their own personal knowledge, and when compared they were found to corroborate each other. The same was found true when comparing the statement of their own qualifications, when made by the individual voter to witnesses who testified to them before the commissioner.

The evidence pointed, in very many instances, to the individual voter, by name, street, and number. The voter, or his neighbor, could have been produced in an hour, and his qualifications shown in reply. This was done in some

instances, thus adding to the weight of the evidence as to those which remained uncontradicted.

From the evidence derived from all these sources, the committee have endeavored to purge and sift the polls on the one side and the other, and to deduct from the vote of each party such as in their opinion have been satisfactorily proved to be fraudulent, as well in the precincts they have decided to reject altogether as in the others. They have appended to this report the name of each voter so stricken from the poll, with the number of the ballot he cast attached, together with the precinct in which he cast his ballot. A reference to the abstract of ballots will show from the vote of which party each name is to be deducted. It is utterly impracticable to recite in this report, in connexion with each voter's name, the testimony upon which the determination of the committee in respect to it is based. Such a course would be but the reproduction, for the perusal of the House, of the great mass of testimony already before it. They point out, without repeating, the testimony, and state the principles they have applied to, and the weight they have given it.

The committee have added to the vote of Mr. Blair eight votes which were thrown out by the judges of election in the western precinct of the first ward because they were upon a ballot which was headed, "for Congress, Francis P. Blair;" then followed, "for the State senate," ———; then right over the list of candidates for representatives to the State legislature was, in large letters, for Representatives for Congress;" then followed thirteen names. The committee entertain no doubt that the voters intended to vote for Mr. Blair for representative in Congress, and, according to a well-established rule, they have awarded him these votes. (See Turner *vs.* Baylies, Contested Election Cases, p. 234.)

The committee also added to the vote of Mr. Blair two votes of persons, Asa A. Jones and Frederick Ritschy, who testify that they voted in a particular precinct for him, and it appears that they were not counted for him. There does not appear to be any good reason for doubting their testimony.

They have also deducted from the poll of the sitting member six votes cast at Mehl's store, by persons whose names could not be ascertained, but who were not, in the opinion of the committee, qualified voters. They have deducted from the poll of the contestant, and added to that of the sitting member, the votes of J. R. Washington and John Fitzmaurice, who testify that they voted for the sitting member, and it appears by the abstract that they were counted for the contestant. There were others who so testified, but the abstract shows that they were counted as they testified they voted. The sitting member also showed by the census returns that William Moeller was not naturalized; but as the abstract shows that he was counted twice, Nos. 439 and 816, once for the sitting member and once for the contestant, no deduction is made from the poll of either on account of this vote.

The committee have, in addition to the foregoing corrections of the poll on both sides, after a careful consideration of the whole testimony, rejected from the count of both the sitting member and the contestant, as in their opinion cast by persons not qualified to vote, both in those precincts they have decided to reject altogether and in the others, votes in the several precincts, as follows:

The name of each voter and the number of his ballot, and the page of the abstract where it appears for whom he voted, are all given in the appendix.

From the poll of the sitting member they have rejected at—

Carondelet precinct	60 votes.
Second ward, eastern precinct	16
Third ward, eastern precinct	21
Fourth ward, eastern precinct	150
Fourth ward, western precinct	27

Sixth ward, eastern precinct	27	votes.
Sixth ward, western precinct	3	
Seventh ward, eastern precinct	51	
Eighth ward, eastern precinct	86	
Seventh ward, western precinct	3	
Eighth ward, western precinct	5	
Ninth ward, eastern precinct	50	
Ninth ward, western precinct	30	
Tenth ward, eastern precinct	35	
Tenth ward, western precinct	31	
Mehl's store	3	
Central House	3	
	601	
Gravois coal mines	61	
Harlem House	1	
Total	663	

From the poll of the contestant they have rejected at—

Second ward, eastern precinct	9	votes.
Third ward, eastern precinct	6	
Fourth ward, eastern precinct	17	
Fourth ward, western precinct	1	
Ninth ward, eastern precinct	3	
Ninth ward, western precinct	2	
Carondelet	15	
Not known where voting	2	
Total	55	

There were many other votes challenged on each side, in reference to some of which the committee were satisfied that they were cast by legal voters; in others they were left in doubt by the evidence; in all which cases the votes were left as counted.

From the whole investigation the committee deduce the following results:

If the Gravois coal mines precinct, the G. Sappington precinct, and the Harlem House precinct be rejected, in accordance with the conclusion of the committee heretofore given, and the illegal votes cast on both sides in the other precincts be deducted, the result will be as follows, viz:

For Mr. Blair, official vote		6,630	
Deduct clerical error, eastern precinct, 7th ward	180		
Deduct erroneous count of votes cast for Barrett	2		
Deduct illegal votes rejected by committee	55		
Deduct votes cast at Gravois coal mines	7		
Deduct votes cast at G. Sappington's	6		
Deduct votes cast at Harlem House	16		
		266	
		6,364	
Add votes thrown out at a western precinct, 1st ward	8		
Add votes not counted	2		
		10	
			6,374

For Mr. Barrett, official vote		7,057
Deduct names unknown at Mehl's store	6	
Deduct illegal votes rejected by committee	601	
Deduct votes cast at Gravois coal mines	153	
Deduct votes cast at G. Sappington's	42	
Deduct votes cast at Harlem House	51	
		853
		6,204
Add votes erroneously counted for Blair		2
		6,206
Majority for Blair		168

If the *ex parte* affidavit in reference to the Harlem House precinct be received as evidence, and it should be considered as sufficiently proved by the sitting member that the officers at that precinct were qualified, the result would be as follows:

For Mr. Blair, official vote		6,630
Deduct clerical error, eastern precinct, 7th ward	180	
Deduct erroneous count of votes cast for Barrett	2	
Deduct illegal votes rejected by committee	55	
Deduct votes cast at Gravois coal mines	7	
Deduct votes cast at G. Sappington's	6	
		250
		6,380
Add votes thrown out at western precinct, 1st ward	8	
Add votes not counted	2	
		10
		6,390
For Mr. Barrett, official vote		7,057
Deduct names unknown at Mehl's store	6	
Deduct illegal votes rejected by committee	602	
Deduct votes cast at Gravois coal mines	153	
Deduct votes cast at G. Sappington's	42	
		803
		6,254
Add votes erroneously counted for Blair		2
		6,256
Majority for Blair		134

If, however, there should be deducted from neither poll any votes for failure of officers of election to qualify, but only those which, in the opinion of the committee, were cast by persons not qualified to cast them at each of the precincts without regard to the proceedings being conducted in conformity with law, the result would be as follows, viz:

For Mr. Blair, official vote		6,630
Deduct clerical error, eastern precinct, 7th ward	180	
Deduct erroneous count, votes cast for Barrett	2	
Deduct illegal votes rejected by committee	55	
		237
		6,393

Add votes thrown out, western precinct, 1st ward	8		
Add votes not counted	2		
	—	10	
			6, 403
For Mr. Barrett, official vote		7, 057	
Deduct names unknown at Mehl's store	6		
Deduct illegal votes rejected by committee	663		
	—	663	
		6, 388	
Add two votes erroneously counted for Blair		2	
			6, 390
Majority for Blair			13

It will be seen that, whichever of these conclusions shall be arrived at by the House, the result is the same, and the contestant is entitled to the seat.

The committee therefore recommend the adoption of the accompanying resolves:

Resolved, That Hon. J. Richard Barrett is not entitled to a seat in the thirty-sixth Congress as a representative of the 1st congressional district of Missouri.

Resolved, That Hon. Francis P. Blair, jr., is entitled to a seat in the thirty-sixth Congress as a representative from the 1st congressional district of Missouri.

The contestant, alleging that in a particular precinct the judges of election were not sworn according to law, the committee held that it was competent *to prove* that they had been qualified. But *who* shall prove it, "the man who says that these votes should be counted, or the man who alleges that these votes are fraudulent?" Upon this point Mr. DAWES spoke as follows in the House:

* * * * * Certainly, he who claims that the votes should be counted; who asks that votes, coming here not according to the form of law, and who says that the judges were, in point of fact, qualified, should prove it. He had notice in the specification of the grounds of contest, and he was permitted by the committee to prove the fact. And although he summoned and examined witnesses about everything else, he put no question to any witness to prove whether these officers were or were not sworn.

According to the congressional precedents covering the precise point referred to in the report of the committee, the burden of proof was on him to show that these judges were qualified, if they were qualified. Having failed to do so, it follows, for the purposes of this case, that they were not qualified; and the precedents of Congress are, that the votes, as returned by them, should be rejected. But the committee came to the conclusion that no man's honest vote should be rejected because the judge of election had failed to conform to the law. But what is the method of showing the facts? The returns are not according to law. They are not evidence of themselves, because on their face they are defective; they can prove nothing. They are not like the return of an officer, made according to law, which proves itself. They are not like the judgments of a court, perfect on their face, which prove themselves. They are not like the returns from the different polls, which are conformable to the law, and which prove themselves. They have not the elements of a record; and the question is, How shall we ascertain whether an honest voter cast his vote at these polls? Certainly, sir, by requiring the man who asks you to count a vote to show that it was an honest vote. And the rule which the committee adopted was: first, that, although there were no certificates on the returns, still that did not bar anybody from showing that, in point of fact, the judges were qualified. And the notice was given, and the allegation that they were not sworn was distinctly made. It was the part of the sitting member to show that they were qualified. That not having been done by him, the committee ruled that each vote cast in these precincts, and shown to be a fair and honest vote, should be counted. In other words, this is the rule, and it is one in conformity with all the precedents as well of Congress as elsewhere. It is in conformity with all that chain of authority stated by the minority of the committee for the State of New York, that the acts of officers *de facto* are valid. It is in conformity with all the precedents of cases that we have been able to examine, that the votes should be counted when he who asks them to be counted shows that they were fairly and honestly cast. This was the rule applied to three of these precincts by the committee.

The committee went further. They felt a disposition themselves, without the aid of the sitting member, who asked us to count all these votes in the gross, to sift these very polls. The allegation on the part of the contestant was, that in each one of the thirty-five precincts there were illegal votes; and, on the part of the sitting member, there was an allegation that, in each one of these, there were illegal votes cast for the contestant. That rendered it necessary, therefore, for the committee to plunge into the examination of these whole 19,000 votes, and, if possible, to search out and ascertain how many of them should be counted and how many rejected. I can only, in the short time allowed me, state to the House the principles on which the committee acted. The result is, that they rejected from all of the precincts in the whole city 663 votes that were cast for the sitting member, and 55 that were cast for the contestant. In arriving at that conclusion, they were governed by these principles: one class of the voters rejected were those who came on the stand and swore themselves that they were not qualified, and those in regard to whom others swore that they said they were not qualified; that they said they were not naturalized; that they said they had not resided one year in the State; that they said they were minors, or were otherwise disqualified. This kind of testimony was sanctioned in the last Congress, in the case of Vallandigham and Campbell, and was sanctioned by other precedents of Congress, and in English cases; and it is not, I believe, controverted by the minority of the committee.

Still further:

Immediately after this election, the city authorities passed an ordinance requiring the census of the city to be taken. The city was divided into ten distinct divisions or districts, and the census takers, in addition to the enumeration of the inhabitants, were instructed to collect certain statistics, and, among others, in reference to the nationality, residence, and age of the inhabitants. These census returns were objected to by the sitting member, first, on the ground that the evidence was not competent, in any shape, and, second, that the manner of producing it before the committee was not legal. That it was competent, in some shape, appeared to the committee apparent, from the fact, in respect to the greater portion of it, that the census taker himself came forward and testified to his own report; that he found, at such a number, on such a street, A B, who told him he was not naturalized; and at such a place or such a residence, C D, who told him he had not been in the city a year. At another place he found another, perhaps, who told him that he was a minor. From the memoranda which he made at the time he ascertained that the facts which appeared in his report before him were correct, and he swore to them.

Mr. Speaker, I find my time has nearly expired. I desire merely to say further in this matter, that, according to the rules of law and evidence, the census report which was produced before the committee, as examined by the census takers themselves, and sworn to as correct, is competent evidence.

Now, sir, this I know: that this whole testimony, voluminous as it is, contains a great deal of chaff; a great deal of hearsay evidence, which has nothing to do with this case. My friends of the minority of the committee have shown great industry in collecting together as much as they could of this hearsay evidence, and claiming—in which the majority of this committee entirely concur—that it is not legal testimony on which a case can properly be made out. I have to say that the majority of the committee joined the minority in rejecting this hearsay testimony, and have applied it to no case in judging of the qualifications of voters, except to this extent: that the statement of a voter himself, in reference to his qualifications, was admitted. They thought, with the minority of the committee, that, in conformity to precedent, that could be received as legitimate evidence in deciding upon the qualifications of voters.

The subjoined extracts are from Mr. Gilmer's argument against the report:

Now, I call attention to the general terms in which the majority of the committee dispose of this matter of the 663 illegal votes. They say that *many* of these votes are shown to have been illegal by the oath of the census taker and by the testimony of the voters themselves. But why did they not tell the House *how many* of these 663 votes were thus shown to be illegal? If it had struck them as important, they should, in furnishing information to the House, have stated *how many* of these 663 votes were shown to be illegal by witnesses having knowledge of the fact. *That showing, correctly made*, would have put an end to all this controversy. But because *some* of these 663 votes are shown to have been illegal, and to have been counted for Mr. Barrett, they come to the conclusion that the whole 663 votes were illegal, and were counted for Mr. Barrett. The evidence as to their illegality only goes to some 27 or 30 of them—certainly not to half the remaining majority—and yet they apply that evidence to the whole.

Then, again, what right had this census taker, in taking the enumeration of the city, to say anything about the nativity, age, birth, or length of residence of the citizens? There was no law to authorize any such a thing. The gentlemen on the other side have not pretended that there was any such law; at least, they have not been kind enough to furnish us with it. They do show the authority of the court to appoint a census taker, whose duty it is to make a correct enumeration of the inhabitants: and when he has done that, I conceive he has discharged all the duty the law requires of him—all that he could legally or authoritatively do.

If, however, a witness had voluntarily gone around the city—I care not whether according to law or contrary to law—and taken the statements as to these voters themselves, as to their length of residence, as to their not being of age, or as to their not being naturalized, and, this being done, Mr. Blair had notified the sitting member that he would take evidence as to the truth of these unauthorized notes or memoranda on the census list, before a commissioner, that would have altered the case considerably, especially if the census taker, or other witness, had proved these notes or memoranda were true. The proof shows illegality extending to 27 or 30 votes; certainly not to the extent of half the remaining majority. The statement of the census taker proves nothing, any more than would a letter from a respectable citizen, stating what he had found out in his travels among the people, not otherwise in the usual and established way proved to be true.

Now, the majority have furnished us here with the law under which this census was taken, and I will call the attention of the House to it:

"AN ORDINANCE providing for taking the census of the city of St. Louis.

"SEC. 1. *Be it ordained by the city council of the city of St. Louis*, That the mayor shall appoint ten competent persons, who shall act in conjunction with the city assessors, whose duty it shall be to proceed immediately to take the census of the city of St. Louis, in conformity with existing ordinances.

"SEC. 2. So much of ordinances Nos. 3,433 and 3,573 as conflict with section one of this ordinance are hereby repealed.

"Approved August 13, 1858."

There is no ordinance authorizing any such census, to the extent as is claimed by the contestant was taken, to be taken. There is no law of Missouri, I repeat, authorizing any such census as that to be taken. If there is any such law, or any such ordinance, it has not been shown to the committee; and, in accordance with all reasonable rules, it devolves upon the majority of the committee to show that there was such legal authority.

I take it for granted, then, that this census taker had no more right, when he went round to take this census, to attach to the names of the persons upon his list any memoranda in relation to their qualifications to vote, either as to residence, age, nativity, naturalization, or anything else, than any one else; and if he performed such a work without the authority or sanction of law, I submit that it only amounts to the same thing as if it had been done by anybody else, and is entitled to no more consideration at our hands. Why, in this case Mr. Blair did not have the census taker examined upon the whole list returned by him. According to the evidence, he did not go to the houses and examine the parties whose names he put upon his list, but he inquired of their neighbors, their wives, their children, and he sets down on his list notes according to such suggestions as he could get from others, we know not from whom. He then attaches to their names these thus obtained facts about age, naturalization, and residence. Now, sir, as to the fact that the sitting member had these witnesses within his reach, and did not prove these notes or memoranda of the census taker to be true, there is no legal affirmative proof upon the subject of these notes. When my friend comes to conclude this debate, as he will have at least twenty-four hours for preparation, then I want him to show the House, by any witnesses who testify from actual knowledge, that these 663 votes were illegal; if not all, how many. When he shall have done that correctly and fairly, as he will doubtless if he attempts it, we will have important and material light before us.

I am ready to admit that when a census is taken in conformity to law, and becomes a record, or *quasi* record, it may amount to something in the shape of evidence for some purposes; but unless it has been taken according to or by an authority of law, and then, unless a certified transcript or a sworn copy of it be produced, it cannot be received as evidence in the case; just as the return of a sheriff on an execution, a fiat of a judge, or any other judicial act that is required or authorized by law, either State or federal. Is that the law? To ascertain that fact, all the House will have to do will be to turn their attention to the mode by which this proof is brought here. They will find that the number of these illegal voters, footing up 663, is not proved by any admissible evidence. You may take the Vallandigham case, or any other case that has ever been adjudicated in this house, as your standard for admitting evidence, and you will never get these 663 votes proved illegal, by many, many figures. We have to arrive at that point, or the conclusion of the majority report cannot be sustained. When we look at the testimony, according to my recollection of it, in one case a man is brought up before the commissioner with a loose slip or piece of paper; when asked about it, he answers that it is a portion of the list of the census takers. "Did you take it?" "No." "Where did you get it?" "Why, I think I got it of Mr. Blair, or somebody else."

Now, Mr. Speaker, I ask the members of this house to read this evidence. You will not be put to much trouble about it. If you will take the minority report, it will direct you to the evidence upon these points; and when you have gone through it, you will be able to judge for yourselves the number of these 663 votes that are proved to be illegal. If you reject every vote about which there is any sort of evidence, you will still have some three hundred or more remaining. I speak in round numbers.

Now, this is the *point* in this whole case. It will so appear to every lawyer, and to every member of this body. It not only appeals to our sense and to our judgment, according to the rules of law arriving at truth, but to our consciences enlightened, "to do to others as we would that others should do to us." In a matter of such importance as this I will not permit myself to believe that members will decide upon it from feeling and party prejudice, or without giving the case its due consideration in relation to the law applicable to the case, and the facts proved according to reasonable and established rules and usages.

As to this matter of qualifying the judges, I respectfully call the attention of the House to the authorities referred to in the report of the minority. Mr. Blair, at the beginning, acted on these authorities. When he started, he seems to have been a better lawyer than when he closed the case. He seems to have been aware, himself, that judges in a court, or at an election, if they discharge the duty assigned to them by the law, their judgments are considered regular until the contrary is shown. They are presumed to act under the oath which the law requires they should take before they do anything. If a party undertakes to traverse the legality of the judgment of the judge of election on his return, it devolves upon him to show the alleged illegality. The contestant in this case stated that he was going to take testimony to show that these judges of the election were not sworn, but he has failed to do so. It was his duty to have furnished proof on that subject. This he fails to do. And what does he then do?

In their report the majority of the committee, in substance, say for him: "Inasmuch as I gave you notice that I was going to prove that fact, and inasmuch as that is one of the grounds of my contest, and you did not disprove it, therefore it must be taken as I have alleged it to be, although I have taken no proof, as I said that I would." How would it be with a court? Suppose you give notice that you impeach its judgment, upon the ground that the officer who adjudged or certified to it was not sworn; when the trial comes on, you have taken no proof on that point; can you be heard and say that you gave notice, but have taken no proof, yet inasmuch as the adversary has not disproved the fact, it must be taken as proved that the officer was not sworn?

Throw out the three precincts referred to by our friends; admit their showing to be right; and throw out all improper and illegal votes proved, and there are left hundreds for Barrett's majority, and he is proved to be entitled to his seat. There cannot be, as I humbly submit, any difference of opinion among the legal profession of the House on this point, which is the material one in the case—I mean as to the character of proof necessary to make out these 600 illegal votes. These votes have not been shown—I mean the much larger portion of them—to be illegal by any rules established in any court; by any rule of practice to be found in any book regulating the practice of any court, State or federal; or by any rule upon which any legislative body has acted in similar cases. Under the census decree, or ordinance, there was no power to take anything but an enumeration of the citizens. The census taker, under the ordinance, had no authority to inquire in reference to the qualification of the voters. He was not instructed by this ordinance to do any such thing. *I ask who instructed him to do this?* In all fairness, I submit that it is not insisting on too much to say that the memoranda which the census taker made as to the qualification of voters were nothing more than if made by anybody else. It would be carrying hearsay a long way to give any effect and force to them.

Upon the census report, Mr. STEVENSON argued as follows:

I am thus particular, because the authority to take this census, in its limitation upon the census takers as to the subject-matter of inquiry in making this enumeration, is the pregnant and beginning point in this discussion. The ordinance which I have read confines the persons charged with the duty of its execution to a simple enumeration of the inhabitants of the city. Their inquiries *by law* stopped there. I was, therefore, astounded by a statement in the majority report, that the census takers were instructed, in addition to an enumeration of inhabitants, to ascertain and report various other matters of statistical information. I deny that any such instructions were given, or that any authority existed for making them. This statement of the majority is gratuitous—unsupported by evidence, and unfounded in fact. In order that I may do the majority of the committee no injustice, I read from their report *on this point:*

"On the 13th day of August, 1858, the city council of St. Louis passed an ordinance to take the census of the city provided by its charter and previous ordinances. A copy of this ordinance will be annexed to this report. For this purpose the city was divided into districts, and census takers were appointed for each census district. They were instructed, in addition to an enumeration of the inhabitants, to ascertain and report various other matters of statistical information; among which was the nationality of the inhabitants found within their respective precincts, and, whether naturalized or not, if foreign-born; how long resident," &c.

I demand to know the ground on which this statement rests. I ask the gentleman [Mr. Dawes] who made this report to tell me where the evidence exists to support that statement. He cannot furnish it, because it never was offered. It is untrue in point of fact. The only evidence of any authority to take this census is the city ordinance, which the majority of the committee append to their report, and which was read by me. It limits all engaged in its

execution to an "enumeration," simply, of the people. The census takers had no authority under it to do anything except to ascertain the number of inhabitants St. Louis contained. They had no more right to inquire into nationality, into citizenship, or into residence, than they had a right to inquire of you, sir, your age; or of me, mine. Everything else which these census takers did, and every other statement contained in these alleged returns, *was unauthorized* and illegal. I demand, in the name of truth, to know on what evidence this statement in the majority report is based. I will yield to the gentleman from Massachusetts, [Mr. Dawes,] who made the report, to sustain this question, if he desires it. I will pause that he may do so. As he is silent, I take it for granted he agrees with me that there is no evidence to sustain this statement in his report.

Mr. DAWES. Mr. Speaker, I wish merely to say to the gentleman that he is not permitted to take anything for granted by my silence. I have my place to reply, and I shall, as well as I may be able, endeavor to notice the positions which the gentleman takes.

Mr. STEVENSON. Mr. Speaker, I did not ask the gentleman to reply to my positions. I joined issue with him upon the statement of a fact in his report. I stated that there was no evidence to support it. I called upon him, as the author of the majority report, and as one of the representatives of a majority of that committee, charged by this house to investigate this question, to inform the House and myself of any ordinance or other legal authority to these census takers to inquire into the nationality, citizenship, or residence of the inhabitants of St.L ouis. If the proof exists, where is it? If such ordinances exist, why are they not incorporated in the report? The only ordinance offered in evidence is incorporated into the majority report; and that does not sustain the statement of the report which I have quoted. If no such authority existed, why was this statement made in the majority report? I wish, if possible, still to obtain this information from the gentleman from Massachusetts.

Mr. DAWES. The only difference between the gentleman and myself is, whether he and I shall hold a colloquy while he is arguing his case.

Mr. STEVENSON. I beg my friend's pardon. That is not the issue. I state that this majority report contains statements of facts, as to what was in evidence before our committee in this case, which are not true; and I ask the gentleman to correct me if I am mistaken.

Mr. DAWES. I am perfectly aware that the gentleman states that the majority report in this particular is not true. I heard him distinctly. I heard him also insist upon my getting up and proving that it is true. Now, he will please to hear me say that I propose to do that when my hour is allotted to me.

Mr. STEVENSON. Very well, Mr. Speaker, the gentleman declines, and I must submit. I was polite and courteous in my question to him, and I am constrained to believe that he could have readily given the House and myself the proof, if it existed, going to support the allegation in the majority report that these census takers were authorized to make any inquiry as to residence, nationality, or citizenship. I was justified in pressing the question, as the gentleman informed us the other day he did not expect to speak more than ten minutes in closing *this debate*. I really desired to be informed if any other ordinance other than the one already referred to existed, or what other proof existed on this subject. I regret that, in the discussion of legal questions by legal gentlemen from the same committee, there should be any dispute or misunderstanding as to facts.

But to proceed with my argument. Under the authority conferred by the ordinance I have read, it is said that one person in each ward in the city of St. Louis, accompanied by assistants, proceeded to make out an enumeration of the inhabitants of that city. Written lists of this enumeration are alleged to have been returned by these census takers to the proper municipal office in St. Louis. These lists, as thus made out, are alleged to contain the names, the residences, the nationality, and the citizenship of the residents in the respective wards. No authority to make such inquiries is exhibited. No record or written proof of the appointment of these census takers by any municipal authority in St. Louis was adduced before the committee. No copy of any ordinance was offered prescribing the mode, manner, or obligation under which their duty was to be performed.

There is no proof of the office or officer to whom the census lists were to be returned. Neither the original census lists nor authenticated copies were offered in evidence. No complete census list nor any examined copy can be found in this record; nor was any such offered to be produced before the committee. No reason has been offered by the contestant why complete transcripts of these returns were not produced from the proper office under the certificate of the officer to whose custody they were legally returned. Parol proof was received by a majority of the committee of the existence and alleged contents of these returns. This proof was made by persons who had not been engaged in taking these returns, as well as by others who had been thus employed. Upon such statements of what these census lists contained, as derived from an examination of the lists after their return to the office, and from partial lists made out by the witnesses, and in some instances attached to his deposition, three hundred and twenty-one votes were taken from the sitting member. I submit that the record contains no competent evidence that these census takers ever did discharge that duty. I insist that there is no legal evidence of the taking of that census. Upon the postulates assumed in the majority report, that these returns are official public registers, their existence could only have been established as competent testimony by the production of either the original certified copies, or full and complete examined copies. This voluminous record contains

neither an official nor an unofficial copy of any complete census return in any solitary ward. Witnesses do testify that they were engaged in taking the census, and made out lists, which have been returned; that since such return, they have made out partial copies of such census lists containing the names of persons marked on the said census lists as unnaturalized or non-residents; and that persons of the same name are found on the poll-books. These partial lists of unnaturalized persons (or non-residents, as they are marked on the census returns) are sometimes attached to the deposition, and will hereafter be read and commented on. It is upon this partial testimony of the contents of the alleged official documents, and upon private, partial lists of certain names marked thereon as non-residents, or unnaturalized, that a majority of the committee base their resolutions embodied in their report. On this ground alone more than three hundred voters, whose votes were received, are excluded from the sitting member. If the alleged contents of these census returns are not taken as evidence, it is admitted on all sides that the contestant has made out no case. Exclude all the other contested votes; yield to the contestant everything else that he claims, and if these census returns are excluded from the case, the contestant has not attempted to show a title to a seat upon this floor. Proof of what they contained was received by the committee, and the whole case rests on their competency and reception. The gentleman from Virginia [Mr. Millson] asks me if these census returns were received. Yes sir.

Mr. MILLSON. Mr. Speaker, I asked the question privately of my friend from Kentucky. He has referred to it as if it was a public question, but I will now, as he has alluded to it, ask if the House is to understand that the census returns themselves were received as evidence before this committee? I want to know that.

Mr. STEVENSON. The census returns never have been produced before the committee but parol statements of what those census returns contain have been received, and their contents thus illegally proved have been the basis upon which several hundred votes have been taken from the sitting member. In order to give the majority of the committee the benefit of their argument, upon the admission of these returns as evidence, I will read from their report:

"Another class of voters challenged was unnaturalized persons, those of not sufficient residence in the State or precinct, or minors, or having some other disqualification, though not unknown to the witnesses, as in the case of non-residents. As to the qualification of this class of voters, the admission of the voter, the testimony of his acquaintances and family, of those who had heretofore acted as officers of election, and circumstantial testimony of various kinds, was admitted for what it was worth. In addition to this testimony was that from another source, which was strenuously resisted by the sitting member on two grounds: first, that evidence from this source was not competent in an investigation of this kind; second, that the method of producing it before the committee was in conflict with the well-established rules of evidence. The evidence alluded to was this: On the 13th day of August, 1858, the city council of St. Louis passed an ordinance to take the census of the city provided by its charter and previous ordinances. A copy of this ordinance will be annexed to this report. For this purpose the city was divided into districts, and census takers were appointed for each census district. They were instructed, in addition to an enumeration of the inhabitants, to ascertain and report various other matters of statistical information; among which was the nationality of the inhabitants found within their respective precincts, and, whether naturalized or not, if foreign born; how long resident, &c. It was to the evidence which the reports of these census takers disclosed that the sitting member strenuously objected: first, because under no circumstances could they be evidence of facts which they purport to contain; and, secondly, because of the manner of bringing that evidence before the committee."

It is here apparent that the two objections that we raised to these census returns, as incompetent evidence to establish the citizenship, residence, or age of persons who had voted in this election, are sound. The minority maintained in the committee, and insist here, that these returns, if the original or copies had been produced, would not have been competent to disfranchise any voter whose vote had been received at the election a month before; and, *a fortiori*, that parol evidence of their contents could not be used as competent evidence for any such purpose. Was ever a plainer proposition, Mr. Speaker, submitted to any legal and unprejudiced mind? The propounding of the question would seem to give its solution.

Mr. MILLSON. I asked the question just now because I really had been under the impression that the census taker had been a witness to prove certain illegal votes, and had derived his information from the fact that he took the census; but I certainly had not supposed, and I was surprised to learn, that the census itself was offered in evidence.

Mr. STEVENSON. Yes, Mr. Speaker, the contents of these loose census memoranda, made without authority, were proved by parol; and upon such testimony more than three hundred votes were taken from the contestant. The admission of such proof is an anomaly in judicial proceeding. * * * * * * * * * * *

Here is a party sent out to take a census, say of the city of Washington. He goes to the house of the distinguished gentleman from Pennsylvania, [Mr. Stevens,] and Mr. Stevens is not at home. He applies to some one next door to know whether Mr. Stevens is a resident or is naturalized; and the person applied to, whether jestingly or in earnest, answers the

inquiry that he is not a citizen, and the census taker sets down that information and returns it, and on a verbal statement of the contents of this return Mr. Stevens is disfranchised. It is upon evidence of this precise character that the committee exclude 320 votes cast for the sitting member. I put it to representative integrity, which should be above party, to say whether the office of representative, whether the right of suffrage, are so trivial and unimportant as to be trampled under foot in this national Capitol, by such utter disregard of law and evidence.

Take the very case cited in the majority report—a baptismal register. What does the certificate of the baptism of a child prove in a legal controversy? Suppose the register contains the color of the child as well as the age: is that any evidence? The register is only evidence of the baptism. These census takers were only authorized to make an enumeration of the people. I have read the ordinance, and I defy the gentleman from Massachusetts [Mr. Dawes] to show me that they had any authority to do more than that. I have gone to the trouble to procure a copy of the revised ordinances of the city of St. Louis of 1853, and I say that there is not an ordinance in the book authorizing an inquiry as to residence, citizenship, or nationality. There is no attempt to prove any such authority, and no directions to said census, except the mere heading of the lists. There is no proof by whom this heading was made; but it will hardly be claimed that if it had been proved it would have conferred any authority.

But, Mr Speaker, I go a step further than that. Suppose these census takers had been authorized to inquire into residence and naturalization, and had made such returns, would the mere fact of a name appearing on that list, without any proof of identification, be sufficient? It can hardly be necessary to quote authorities on such a point to a House like this; but let me read a short extract from 1 Greenleaf, section 493:

"In regard to official registers we have already stated the principles on which these books are entitled to credit, to which it is only necessary to add, that where the books possess all the requisites there mentioned, they are admissible as competent evidence of the facts they contain. Thus a parish register is only evidence of the time of the marriage, and of its celebration *de facto;* for these are the only facts necessarily within the knowledge of the party making the entry, &c., &c. In all these and similar cases the register is no proof of the identity of the parties there named with the parties in controversy; but the fact of identity must be established by other evidence. It is also necessary, in all these cases, that the register be one which the law requires should be kept, and that it be kept in the manner prescribed by law."

The salutary and conservative influence of this principle is strongly exhibited in the present controversy.

Mr. DAWES, in conclusion: * * * * The census takers of the United States are instructed to obtain statistics. The term census in the United States has received that construction. Under that name census takers can be instructed and required to obtain all manner of statistics according to the wisdom and discretion of the Superintendent of the Census here at Washington; and the book in the Library of Congress filled with such statistics is evidence for the use of all public men, and in all public and legislative proceedings, subject to such contradiction and explanation as it may be in the power of any one to make and the statistics will admit of. Such is the use made of this census. The United States census tells us how much hay there is in the country, how many oxen, how much cotton is raised, how many foreign-born citizens, how many unnaturalized persons, how many whites, how many blacks, and a thousand other things, all of which are included in the word census.

In reference to this precinct the census taker himself is put upon the stand. He testifies to what his own eyes did see, and what his own ears did hear, when he went out to take this census. He came back with the census as the result of his labors. He certifies to it. He gives the name and street and number of the man he ascertained to be an unnaturalized person, or of the man he ascertained to have his first papers only. We thought, with that evidence before the sitting member, and with an opportunity for him to cross-examine or contradict the witness, call the man living at this number, or his neighbor; and if he did not cross-examine the witness, or produce the slightest evidence to meet this state of facts, we believed it was because he was unable to do so. These were the grounds of our conclusion as to this list of voters. Now, this may not satisfy others; it did us. The House will say whether it does them also.

There is the testimony of several other men who were also census takers, but I must hasten on. In one instance the census taker himself was not examined. A man goes to the census return and copies off what he found there in reference to certain individuals. His testimony is what he found on the census returns. In that very case, old residents of the ward, who had been there for six, twelve, and fifteen years, went to the poll-books and took off the names they found there, and which they had never before heard of; the names of men who had never before, to their knowledge, voted in that ward. Some of these old residents who thus testified had been themselves judges of election, and some clerks of election. They took the list they had and compared it with the list of the census taker, and they were found to coincide, so far as every one of the names upon the list in the report of the majority is concerned.

There were others about which there was more doubt, and we struck them from the list. Then, so far as I now recollect, and so far as I have been able to test it in this brief time, there is not a single voter named upon that list that depends solely upon the evidence that somebody saw the name put down in the census return as not having been naturalized.

A word or two about the qualification of the judges of elections, and I leave this case for gentlemen to pass upon on their own judgments and responsibility. Sir, we rejected a certain number of precincts for the reason that the judges and clerks of those precincts were not sworn. Take these out and there is left a very small number of votes to be rejected as illegal from any other quarter to turn the result, and more than the majority remaining will be found, by direct and positive testimony, to be illegal, independent of all information obtained from the census. Therefore, I propose to dwell a moment upon the propriety of rejecting those precincts, although there is but little left for me to say in vindication of our course after my friend from New Hampshire [Mr. Marston] has set forth in so clear and convincing a manner the facts in the case. First, as to a question of fact. Were these men sworn or not? That is a question of fact. And next, if they were not sworn, what should be the effect upon the polls? Now, sir, there is no evidence upon the returns that they were sworn. I am not saying at this moment whether the law requires it or not. I am only speaking of the fact. There is no evidence upon the poll-lists or returns that they were sworn at all. The contestant alleged, not that he would prove that they were not sworn, as is stated by the sitting member, and in the report of the minority of the committee, but the distinct allegation is made that in this particular district they were not sworn. If a judgment should come up here without evidence that there is a notice to the defendant, and the defendant pleads that he has no notice, to whom does it belong to show that he had notice? Of course it belongs to him to show that he had notice who alleges that there was notice. They went into the examination and occupied sixty days. The sitting member called one of the judges as a witness, but he never asked him a question in reference to that matter. They, the contestant and sitting member, argued the case before the committee, and they argued it about ten days each; one of them insisting all along that the fact that the judges were not sworn was fatal, and the other insisting all along that the fact that they were not sworn did not make any difference. We waited forty days after that, and there came in two affidavits in respect to two other precincts, setting forth that, in respect to them, the judges *had been* sworn. Sir, the whole transaction convinced the committee that this omission of affidavits or evidence as to the other precincts was not accidental.

On the 8th of June, 1860, the House adopted the first resolution declaring the sitting member, Mr. Barrett, not entitled to the seat—yeas 94, nays 92. The second resolution giving the seat to the contestant, Mr. Blair, was then adopted—yeas 93, nays 91.

The debate will be found in Congressional Globe, vols. 41 and 42, as follows:

For the report: Mr. Dawes, p. 2645, vol. 41; Mr. Marston, Appendix p. 445, vol. 42; Mr. Stevens, p. 2766, vol. 41; Mr. Blair, p. 392, vol. 42. Against the report: Mr. Gilmer, p. 2649, vol. 41; Mr. Stevenson, p. 2761, vol. 41; Mr. Phelps, p. 2767, vol. 41; Mr. Barrett, p. 395, vol. 42.

THIRTY-SIXTH CONGRESS, FIRST SESSION.

CHRISMAN, *vs.* ANDERSON, *of Kentucky.*

Under the laws of Kentucky, county canvassers cannot send in an *amended* return to the State board.

Two county boards having sent to the State board a supplemental certificate, it refused to receive it. The committee held that the decision of the State board was correct, but that the action of the State board was not conclusive before the house.

It is the duty of the House in contested cases to go behind all certificates for the purpose of correcting mistakes brought to its notice.

In Casey precinct the poll-book was not certified to by *any* of the officers of the election: held, that the vote should not be counted.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 14, 1860.

Mr. STRATTON, from the Committee of Elections, made the following report:

On the first of August, eighteen hundred and fifty-nine, an election for representatives in Congress was held in the State of Kentucky.

In the fourth congressional district William C. Anderson and James S. Chrisman were the opposing candidates.

Mr. Anderson received a certificate of election from the proper officers under the laws of Kentucky, and is now the sitting member in the present Congress from that district. Mr Chrisman being dissatisfied with the action of the board of State canvassers, served notice of contest upon the returned member, in accordance with the provisions of the act of February, 1851, to which the latter responded, and proofs in support of their respective allegations have been regularly taken under said act and returned to this house.

The fourth congressional district of Kentucky comprises eleven counties and sixty-four voting precincts. By the laws of that State the election board at each precinct consists of two judges, a clerk, (who are appointed by the county court,) and the sheriff or his deputy. It is the duty of this board to count the votes cast at each precinct and certify the result, under their signatures, to the board of county canvassers. The latter board consists of the presiding judge of the county court, the clerk thereof, and the sheriff or other officer acting for him at an election.

The poll-books from the different precincts are required by law to be deposited with the county clerk *within two days* after an election. On the *next* day the board (that is, the county board) shall meet in the clerk's office, between ten and twelve o'clock in the morning, compare the polls, ascertain the correctness of the summing up of the votes, and in case of an election for a representative in Congress, it is made the duty of the board of examiners of each county, *immediately* after the examination of the poll-books, to make out three or more certificates in writing, over their signatures, of the number of votes given in the county for each candidate for said office; one of the certificates to be retained in the clerk's office, another the clerk shall send by the *next mail*, under cover, to the secretary of state, at Frankfort, and the other to be transmitted to the secretary by any private conveyance the clerk may select.

The governor, attorney general, and secretary of state, and in the absence of either, the auditor, or any two of them, are a board for examining the returns of elections for representatives in Congress and certain State officers.

The State board is required when the returns are all in, or on the fourth Monday after an election, whether they are in or out, to make out, in the secretary's office, from the returns made, duplicate certificates in writing, over their signatures, of the election of those having the highest number of votes.

These are the main features of the law prescribing the mode of canvassing the votes and ascertaining the result of an election in Kentucky; and your committee believe from an examination of the evidence and exhibits in the case, with the exception of a single precinct, (which we shall hereafter refer to,) these requirements were substantially complied with.

The voting is *viva voce;* the name of each voter and of the candidate for whom he votes being publicly cried by the sheriff or his deputy, and recorded by the clerk.

According to the summing up and certificate of the board of State canvassers, of the whole number of votes cast Mr. Anderson received 7,204, and Mr. Chrisman 7,201.

The county boards of the respective counties met according to law, and ascertained, as was their duty, the correctness of the summing up of the votes in the different precincts of each county, and transmitted the result of their labors to the board of State canvassers at Frankfort.

The following is a summary of the vote in each of the counties:

	Anderson.	Chrisman.
Adair	547	1,057
Boyle	789	303
Casey	696	448
Clinton	312	578

	Anderson.	Chrisman.
Cumberland	652	368
Greene	482	681
Lincoln	935	440
Pulaski	1,214	1,375
Russell	479	432
Taylor	357	648
Wayne	741	831
	7,204	7,201

These returns having been canvassed by the State board, who met and proceeded, according to law, the certificate of election, as before stated, was awarded to Mr. Anderson.

In the notice of contest there are several grounds set forth upon which the contestant bases his claim to the seat. The sitting member has responded fully to the charges made, and denies their existence in point of fact. The committee do not deem it necessary to refer to all the grounds of contest set forth in the notice and response.

The issue turns upon three points, and to these your committee have directed their investigations.

By the laws of Kentucky, the election having been held on the 1st day of August, it will be remembered that it was the duty of the county canvassers to canvass the returns sent in from the several voting precincts on the *fourth* of August, and transmit the result to the State board *immediately*. This, your committee believe, was done in every instance.

It seems, however, that after the board of canvassers for the county of Boyle had discharged this official duty, and broken up, a supposed mistake of four votes, to the prejudice of the sitting member, was discovered; and in order to correct this, the board reassembled on the *tenth* of August, made a recount, and transmitted an amended certificate to the State board.

This amended certificate the State board refused to receive, giving as a reason therefor that the county board had no right, after they had discharged a particular duty in the manner and at the time and place required by law, to act further in the premises.

In other words, that their power over the subject-matter had ceased, and they had no longer a legal existence.

The same state of facts existed also in the county of Adair, in which, after the votes had been summed up, and the result transmitted to the State board, a mistake of one vote to the prejudice of Anderson was discovered. For the reasons above stated, the State board declined to receive the amended certificate from the county of Adair.

In the county of Cumberland it was discovered that in registering the votes in one of the precincts a mistake of *ten* votes to the prejudice of the contestant had occurred, and also that he sustained a loss of four votes from their having been incorrectly recorded.

On the *thirteenth* of August *two* of the county boards of this county met for the purpose of correcting these mistakes, and certified to the State board the facts herein stated. The State board also declined to receive this supplemental certificate. In so doing, they gave their reasons at length; and as their opinion is a part of the record in this case, we beg leave to submit it to the consideration of the House. It is proper to say that this board is composed of legal gentlemen of eminence, whose opinions upon the construction of the laws of their own State is entitled to much weight.

Mem.—The above certificate is based on returns regularly made out and

certified by the respective boards of examiners on the day fixed by law, and duly returned to the secretary of state. An amended return was forwarded from Boyle county certifying that there was a mistake of four votes against W. C. Anderson, as appeared by a re-examination and scrutiny of the poll-books. Appended to this corrected return is a statement by the clerk, that after the examiners had given the certificate of the vote of the county, he, the clerk, had loaned the poll-books from his office to some gentlemen, who discovered the error which is attempted to be corrected, and reported it to the examiners, who, on re-examination, found it was so. After this, and after all the returns for the district were in, letters were filed with the secretary, stating that the examiners of Cumberland county had made a mistake in their certificate of the vote of that county, and time was asked to have it corrected. This was granted in order that all questions might be fairly made, and a decision had upon the facts as they existed. An amended certificate from Cumberland county was accordingly forwarded to the secretary, stating that the vote of W. C. Anderson in that county was 650, and that for J. S. Chrisman 380. A certificate was also filed from the county of Adair, stating that there was a clerical mistake of one vote against Anderson.

We have felt constrained, in the exercise of our best judgment on the proper construction of the law, to reject all these amended returns, and to issue the certificate according to the original returns made to the secretary of state.

The law in relation to elections provides that the judges shall attend to the summing up of the votes, certify the poll-books, and deliver them in a *sealed envelope to the sheriff*. The same law requires that each judge shall retain a duplicate statement of the summing up of his precinct, which, in a contingency named, may be used as evidence of the vote. It also requires that the poll-books of the different precincts shall, within two days after the election, be deposited by the sheriff with the clerk of the county court, and on the next day thereafter the board of examiners shall compare them, ascertain the correctness of the summing up, and make out three written certificates in the case of a representative in Congress, certifying the number of votes given in the county for each of the candidates, one of which certificates is to be retained in the clerk's office, another forwarded by mail to the secretary of state, and the third sent to the secretary by any private conveyance. We, as a State board, are to act on the returns thus made, and make out triplicate certificates of those having the highest number of votes; and our functions as examiners do not more clearly cease when we have made our certificate of election, than in our opinion do those of the county examiners after they have certified the full vote of the county. If this be not the just and proper construction of the law, why require the poll-books to be *sealed* when they pass out of the hands of the judges of election? If a correction can be made in nine days after the poll-books are unsealed and opened to the inspection of whoever may choose to examine them, or after they have been taken out of the clerk's office, there would be but little efficacy in requiring them to be sealed in the first instance.

If such additional returns are legal, the State board of examiners would be bound to receive and act on whatever correction should be made before their certificates were given; and as their functions are confined to the summing up the votes, they would be precluded from any inquiry as to the manner in which such corrections were brought about. They could not institute an inquiry as to whether or not the poll-books had been changed or altered after the seals were broken and they had passed into other hands than the examiners. The amended certificates would, in all cases, necessarily be conclusive on the examiners here.

We think, therefore, it is clear, when the county board have acted on the poll-books of the whole county, and delivered their certificates to the clerk, who has transmitted them to the secretary, that their functions cease, and they have no power to recall or change those certificates.

The supposed analogy between this case and that of the special judicial election in 1857 will be found, on examination, not to exist. In that case, as in this, time was given for the correction of a supposed error in Meade county of twelve votes against Mr. Bullitt, so that a decision might be had upon the effect of such correction; but as the correction, if made and allowed, would not have changed the result of the election, no decision was had by the board on the question.

In the judicial election the certificate first forwarded to the secretary from the county of Hart gave Wheat 122 votes. The State board of examiners, before this certificate was acted on, were notified that there was a clerical mistake in copying this certificate as to the number of votes cast for Wheat, and that the other two certificates, made out at the same time, contained the true number of votes according to the poll-books. One of these certificates was transmitted to the secretary, showing that Wheat had received 222 votes, instead of 122. We thus had two original certificates which were authorized by law to be sent to the secretary, and the question was, which was right? The clerk and examiners made affidavit that the last one sent was an exact copy of the one on file in the clerk's office, and contained the correct result of the poll-books, and our action was accordingly based on the last one.

The examiners of Nelson county first sent a certificate of the votes of that county, *stating on its face* that they had not included the vote of the Bloomfield precinct, as they had not received it. They afterwards forwarded an additional certificate giving the vote of that precinct, which had in due time been delivered by the sheriff under seal to the deputy clerk, and by neglect had not been laid before the examiners. They did not attempt to make any change in the vote of the precinct which they had before certified, but certified the vote of the precinct thus returned under seal by them. The vote of this precinct was counted in favor of Mr Bullitt, simply on the ground that, as the law required the examiners to act on the books of each precinct, their duty did not cease until they had so acted. But in no instance did they attempt to recount the votes of any precinct after it had been once certified.

It is proper to add, that a distinction was made at the time, by the examiners, between the case as presented by this special election, and the correction of the poll-books after they had been certified by the county examiners, and the corrections were allowed on the express ground that they did not involve the legality of a re-scrutiny and re-examination of the vote as certified. It may not be improper also to state, that when the amended return from Boyle was filed, and before it was known what effect it was to have on the result, the opinion of the undersigned is known to have been adverse to its reception.

Given under our hands this 29th of August, 1859.

C. S. MOREHEAD.
MASON BROWN, *Secretary of State.*
JAMES HARLAN, *Attorney General.*

After a careful examination of the laws prescribing the mode of canvassing' summing, and returning votes by the officers of the precinct, county, and State boards, your committee concur in the conclusion arrived at by the board of State canvassers. They believe the action of the board was in strict conformity with the statutes of Kentucky.

Your committee, however, do not suppose that the action of the State board is final and conclusive upon this house. In every case of a contested election we believe it to be the duty of the House, by its constituted agents, to go behind all certificates for the purpose of inquiring into and correcting all mistakes which may be brought to its notice.

Entertaining these views, if the mistakes above mentioned were the only ones which occurred in the district, the contestant would undoubtedly be entitled to the seat now occupied by the sitting member.

But having once opened the contest, as well the sitting member as the contestant, with a degree of zeal and industry almost without a parallel, entered upon a searching investigation and purgation of the polls of the entire district. The whole time allowed by law was consumed in taking testimony, and the evidence, which fills two volumes, containing nearly fifteen hundred pages, has been submitted to your committee. The case was fully argued by both parties upon the law and the evidence.

After a careful investigation, we submit the following as the conclusions to which we have arrived:

First, as to the correction of the mistakes at the different polls.

The official vote for Anderson was		7,204
To this we add the following votes cast for Anderson, but through mistake not counted for him:		
A mistake in Boyle county in adding up		4
A mistake in recording the vote of William R. Bowman, of Boyle county		1
A mistake in recording the vote of Richard Pendergrast, of Boyle county		1
A mistake in recording the vote of James Stout, of Lincoln county		2
A mistake in recording the vote of Hiram Withers, of Pulaski county		2
A mistake in recording the vote of George R. Vaught, of Pulaski county		1
A mistake in recording the vote of Frank Harrison, of Pulaski county		1
A mistake in recording the vote of James Hunt, of Wayne county		2
A mistake in recording the vote of Peter Phips, of Wayne county		1
A mistake in recording the vote of S. M. Baker, of Adair county		1
A mistake in recording the vote of A. J. Yerk, of Clinton county		1
A mistake in erasing the names of the following persons from the poll-list in Clinton county, after they had voted and left the polls, said persons having voted for Anderson, viz: W. A. Sidwell, Jesse Sidwell, and W. G. Ellis		3
A mistake in not recording and counting for Anderson the votes of B. W. Moss and C. B. Kirkland, who were legal and qualified voters, and who offered to cast their votes for Anderson		2
A mistake in recording the votes of Delany, Griffin, and Chilton, after the closing of the polls		3
		7,229
Vote for Anderson, after correcting *mistakes*		7,229
The official vote for Chrisman was	7,201	
To this add the mistake at Kettle Creek precinct in registering votes	10	
A further mistake in said precinct	4	
A mistake in recording the vote of Nelson Pendergrast	2	
A mistake in recording the vote of Virgil P. Moore, of Pulaski county	2	
A mistake in recording the vote of Ebenezer P. Rice, of Wayne county	2	
A mistake in recording the vote of William Davis, of Pulaski county	1	
		7,222
Majority for Anderson		7

Thus it will be seen, that after correcting all the mistakes in recording votes, &c., which are sustained by the proof, the sitting member has a majority of seven votes.

Both the contestant and the sitting member, in the notice and answer filed, call upon the committee to reject the entire poll of certain precincts, because of alleged irregularities. Upon a careful examination of the returns from the precincts objected to, we are of opinion that the objections are not sustained, save in one instance.

The poll-book from Casey precinct, Casey county, is not certified to by any of the officers of the election, neither judges nor clerk. Its correctness is vouched for by no one.

(See printed testimony, vol. 1, page 449.)

Your committee are therefore of opinion that this precinct should not be counted.

The vote stood for Chrisman	95	
The vote stood for Anderson	49	
Anderson's vote	7,229	
Deduct Casey precinct	49	
		7,180
Chrisman's vote	7,222	
Deduct Casey precinct	95	
		7,127
Anderson's majority		53

We proceed now to a consideration of the illegal votes cast for each party. In every case where the challenge is sustained by competent and sufficient testimony we have deducted the vote from the party for whom it was cast. In every case where the committee had any doubt as to the challenge being fully sustained by the evidence the vote has not been disturbed. The contestant has challenged by name one hundred and thirteen votes, and the sitting member two hundred and eleven. In many instances no proof was offered to sustain the challenge. We find that of the number challenged by the contestant twenty-five are shown by competent proof to have been illegal votes, and we have deducted them from the poll of the sitting member. Of those challenged by the sitting member eighty-one are proved to have been illegal, and they are deducted from the poll of the contestant. We append to our report schedules, marked A and B respectively, which contain the names of the voters whose votes we have deducted from the respective polls, and a reference to the evidence by which each challenge is sustained.

With these corrections of the polls, to which our attention has been directed, the result is as follows:

Anderson's vote		7,180
Deduct illegal votes		25
		7,155
Chrisman's vote	7,127	
Deduct illegal votes	81	
		7,046
Anderson's majority		109

In conclusion the committee beg leave to remark, that had every vote challenged by the contestant been sustained and deducted from the poll of the sitting member, it would still have left him a majority beyond that ascertained by the

official returns. In every view of the case which has been presented, we believe the sitting member is the duly elected representative of the fourth congressional district of Kentucky, and we therefore ask the concurrence of the House in the following resolution:

Resolved, That the Hon. William C. Anderson is entitled to the seat now held by him as representative in the thirty-sixth Congress from the fourth congressional district of Kentucky.

The minority of the committee argue as follows upon the act of the State board of examiners:

The pretext upon which the board of State examiners perpetuate the erroneous returns and decline to recognize the corrected certificates is scarcely worthy the serious consideration of the House. If of value at any time, that time has now expired, as the House is to judge of all the facts in connexion with the seat in controversy. But we contend that it never had the sanction of a just construction of the legal authority under which they acted, and will treat it as if the question now was that of the right of the contestant to the *prima facie* certificate of election

The board of State examiners predicate their refusal to recognize the corrected certificates upon the basis that, as the law provided, after the judges of election shall attend to the summing up of the votes and certifying of the poll-books, they shall deliver them in a sealed envelope to the sheriff. This sealing, if the seal was never broken until it reached the State board, might afford some justification for this *sensitive* aversion of the State board to looking behind the original sealed returns. But, according to the law, within two days after this sealing, the seals are to be broken in the respective counties by the county examiners, who are to compare them with duplicate copies previously ordered to be prepared, and issue three copies of a certificate of the summing up of the result; one to be retained in the clerk's office, another to be sent to the secretary of state by mail, and the third to be forwarded to him by private conveyance. It is upon this idea of the returns having been originally sealed up that the board of State examiners rely upon principally to justify their entire conduct in this case. In their official statement of the grounds on which they rested their decision, they distinctly place it upon this ground. The State examiners say:

"If this be not the just and proper construction of the law, why require the poll-books to be sealed up when they pass out of the hands of the judges of the election?"

Whilst the undersigned do not deem it essential to the merits of the issue to combat the idea of finality embraced in the fact of sealing, they deem it proper, in view of the argument of the State canvassers, to remind the House that this seal, so reverentially alluded to, is not the seal of authority affixed to official documents, but the mere act of sealing the envelope to perfect the security of the returns in passing from the hands of the judges of election to the sheriff.

The State board also contend, as does the sitting member, that the county boards ceased to exist after having once certified returns to the State board, and they became *functus officio*. So far as the sitting member is concerned, the undersigned think he is estopped from any such plea as that, for the reason that he initiated the convention of these boards, which he now alleges were *functus officio*, and recognized their validity by summoning the board in his own county to correct the certificates, when the result as to his own success was doubtful, and he thought a few corrections of alleged errors would appreciate that success.

So far as the board of examiners are concerned, they are estopped by their action in the year 1857. The House will bear in mind that the *personnel* of the board was the same at that time as when they gave the certificate to the sitting member. In that year an election was held for appellate judge, and in

determining that result the board decided as follows: this case is alluded to by the State board in their decision on the case in issue.

NOTE.—In the copy of the returns first sent by the clerk from Hart county the vote was stated to be, for Wheat 122 votes, and for Bullitt 396 votes. The corrected copy by the clerk, and also the certificate by the examiners, shows the vote to be as above cast, viz: for Wheat 222 votes, and for Bullitt 396. The first certificate sent from the county of Nelson stated that the vote was for Wheat 457 votes, and for Bullitt 621 votes. An amended certificate was sent by the examiners, which states that there was an error in the first in omitting to include the vote in Bloomfield precinct, No. 3, which, when given, made the vote as above, viz: 525 votes for Wheat, and 694 votes for Bullitt. A note was also received from the clerk of Meade, stating that a mistake of twelve votes was made by the examiners against Mr. Bullitt in not adding that number to his vote, and that he would reassemble the examiners and have the correction made. *But sufficient time having elapsed to have the mistake corrected*, if it existed, and as it could in no wise change the result, the board did not think it expedient to make longer delay for that purpose.

Given under our hands, at Frankfort, on the 1st day of July, 1857, and in the 66th year of the Commonwealth.

C. S. MOREHEAD.
MASON BROWN.
JAMES HARLAN.

By this it will be seen that the board of examiners then were not only conscious of the propriety and legality of admitting corrected certificates from the county canvassers when received, but that they actually waited until sufficient time had elapsed to have mistakes corrected before declaring their determination, and that then they only declined to wait any longer for a correction in the certificates from the county of Meade, because the errors alleged would not change the result arrived at.

The undersigned do not propose to rest this case upon the suggestions of estoppel so strongly, as they believe, interposing between both the State canvassers and the sitting member and the contestant in issue.

Let the House look at a just construction of the law, under which the State canvassers acted, and compare it with the shallow devices resorted to with a view of breaking its force.

The county board, according to the statute, was merely ministerial in its powers. Certain duties were to be discharged by it, viz: "To compare the polls, ascertain the correctness of the summing up of the votes, and give certificates." If, in summing up, it committed an error, and forwarded that error as a result of what they believed a veritable "summing up of the votes," it is a perversion of right to preclude them from correcting the same, and to insist that the error is to be perpetuated, though the truth had reached them, and they desired to substitute it for what had, by an innocent mistake on their part, become a wrong. The time, according to law, between the meeting of the board of State canvassers and that of county canvassers was twenty-five days. One met on the 4th of August, and the other on the 29th. There must have been some object actuating the makers of this law to elapse so long a time between the meeting of these two boards. What was that object? It was to give the county board ample time before the meeting of the State board to carefully examine all returns, and to report to it the true expression of the popular sentiment, so that there might be no mistake by reason of erroneous addition or any other casualty incident to election returns. In the case at issue, whilst at the first meeting of the county canvassers of Cumberland, upon an erroneous summation of the votes in that county, such a result had been arrived at as would, in the aggregate of the district, defeat the contestant, yet, upon the discovery of palpable errors, they reassembled and corrected them, thus electing the contestant. It is folly to argue that their functions ceased upon their first rendition of what they conceived to be the correct result. The statute creating them especially directed them to ascertain the correctness of the summing up. As long as they failed to discharge that duty correctly, just so long did their func-

tions exist. They were directed to ascertain the correct result. How, until they accomplished that, did their powers cease? Besides, the board of county canvassers is something else than a mere temporary tribunal, living to-day and expiring to morrow. It lives always. It consists of the county judge, clerk of the county court, and sheriff. These are offices that always exist, and are always filled. It is a perpetual, permanent body, and to refuse to it the privilege of correcting its own errors is equivalent to give falsehood the permanent advantage of truth because of the start of the former.

But there is a necessary limitation upon this power to correct as there must be upon everything in government, and that is furnished by the statute. The board of county canvassers and the board of State canvassers, being connected, as it were, the latter depending upon certain acts of the former to furnish it with the means to discharge its duty, and being powerless to do so without the limitation upon the power to correct in the board of county canvassers, must necessarily be restricted to such time as will enable the correct returns to be before the State canvassers to enable them to complete their duty in the time fixed for them in the law so to do.

Did these corrected returns from the county of Cumberland, which elect the contestant, reach the board of State canvassers before the issue of the certificate to the sitting member? It is admitted that they reached there some days before the meeting of the board, and that they were considered by it. The conclusion then is irresistible, that upon returns before them, known by them to be incorrect, they gave the certificate to the sitting member, when at the same time, with corrected certificates, known by them to be veritable, they refused the certificate to the contestant and subjected the people of the district to an unfair and unconstitutional representation in this house.

[The minority continue:]

Having disposed of the pretexts upon which the present occupancy of a seat in the House by the sitting member upon a *prima facie* right is sought to be maintained, the undersigned will refer to the points which the contestant, in view of the error of his position upon these discussed, seeks outside of them to maintain that he was duly elected.

He seeks to disfranchise the voters in Casey Creek precinct, Casey county, and in Pentecost precinct, Cumberland county, in both of which the contestant received majorities.

As to the Casey Creek precinct:

The objection to the vote being counted is, that the judges of the precinct *failed to certify the poll-book over their signatures.* But the poll-book is found in its proper depository when the certified copy was obtained, (A, 451,) and there is no pretence that it is not a correct record of the votes, or that it was not acted on as a correct record by both the county board and the State board.

The answer to the objection is very simple, that the provision of the statute is directory merely, and the omission of the judges to do their duty was not intended by the legislature to disfranchise the voters. That would be punishing the innocent voters for the sin of the judges.—(See The People *vs.* Cook, 14 Barbour, 259; S. C., 4 Selden, 67; Truehart *vs.* Addicks, 2 Texas, 217; Ex parte Heath *et al.*, 3 Hill, 43; Batman *vs.* Meguvan, 1 Metcalf's Ky. Rep., 535.)

It might as well be contended that if an envelope was not used for enclosing the poll-book, before delivering it to the sheriff, that circumstance would vitiate the election, though the poll-book was more surely protected than it could be in an envelope. The construction of the sitting member would invalidate almost every election.

As to the Kettle Creek precinct:

The objection to receiving the vote of this precinct is two-fold: 1. That the

officers, being sworn by an examiner, were not sworn as required. 2. Because the clerk failed to act during the entire day, and the votes were recorded by a judge. Both grounds are met by the answers to the objection to the Casey Creek precinct above, and the authorities there cited.

But again, by the Kentucky Code of Practice, adopted at the session of 1853–'54, it is provided:

"The examiners shall be authorized to administer oaths and give certificates thereof in all cases in which justices of the peace are so authorized."—(Title xiii, sec. 622.) The first objection, as explained by the sitting member in his verbal argument, was that the judges took the oath before an *examiner*, and not a justice of the peace or the sheriff, as required by chapter xxxii, art. iii, sec. 4, of the Revised Statutes of 1852.—(For the evidence see deposition of C. C. Hughes, C, 136.)

The other and remaining point upon which the sitting member rests to sustain his title is the allegation of clerical errors at the several polls.

After correcting all clerical errors, the contestant is discovered by the undersigned to be elected by eight votes, two more than the number by which he was elected upon the summary of the corrected certificates as they appeared before the State board, and this concedes to the sitting member the votes of Horace Weathers, in Pulaski county, and James Hurt, in Wayne county, claimed by him, but to which, by a strict adherence to the law of 1851, he is not entitled, as he never, in his answer to the contestant's notice, alleged those votes to have been given to him.

If this house will go behind the record, and examine the parol proof on both sides, (which it is impossible to incorporate into the limits of a report,) it will clearly appear that the contestant's majority would be swelled beyond a majority of eight votes, which, the undersigned think, are proved very clearly to be his majority.

The undersigned have full faith that the House will, when it weighs the indisputable facts presented by them, repair the wrong that has been so unjustly and so long visited upon the people of the district in issue, and admit to the seat, now illegally filled by the sitting member, the contestant, who is, in their opinion, the duly elected representative of the fourth congressional district of Kentucky.

They therefore offer the following resolutions as a substitute for those of the majority of the committee:

Resolved, That William C. Anderson is not entitled to a seat upon the floor of this house as the representative from the fourth congressional district of Kentucky.

Resolved, That James S. Chrisman is entitled, and is hereby declared the representative from the fourth congressional district of Kentucky.

The debate in the House was confined very closely to the legal questions stated in the report. The subjoined extracts indicate the character of the arguments presented:

Mr. STEVENSON. * * * * But I come back to the pertinent question first propounded by me, why the contestant did not get the certificate instead of the sitting member? No man disputes that the poll-books, upon their face, and as certified by the amended returns of the county boards, show that the contestant got a majority of seven votes. Mr. Anderson himself admits that there was a numerical mistake in the majority of the contestant in one county. The majority of the committee admit it; but they deny that the county board or the State board had a right to correct any error made by the respective county boards as to the true and exact number of votes shown on the face of the poll-books to have been cast for the respective candidates.

Sir, it was the duty of every county board to inspect and canvass the face of every poll-book. They did so; but, in consequence of a numerical mistake of fourteen votes against the contestant, in Cumberland county, which escaped their observation in their first scrutiny, Mr. Anderson received a majority of three. A few days afterwards this mistake was discovered. It was discovered before the State board had met. It was discovered before the State board had canvassed any of the congressional returns, and before any certificate had been issued. The county board of Cumberland county discovered a numerical mistake of four-

teen votes, giving the contestant seven majority over the sitting member; and they corrected that mistake by an amended return. Why did not the State board acquiesce in, and act in accordance with, that corrected return? They undertook to assume—and the majority of the committee sustain their action and agree with them—that this ministerial county board had no authority, after the day on which the law requires them to meet, to correct this return. That is the monstrous proposition in political ethics and against popular right that the majority of this house are called upon now to sustain; that when, on an examination of the poll-books, the county board, who are not authorized to give any certificate, whose only legal function is simply to certify the exact vote as shown upon the face of the poll-books to have been cast in their respective counties for the several candidates, have innocently or designedly, accidentally or improperly, made a false return, it is beyond their power to correct it. Can this startling legal proposition be true? Is there any provision in any statute of Kentucky which tolerates the assumption that any certificate of the returns of an election by any county board of examiners is conclusive upon the *State board*, although it state a falsehood or a fraud? If so, I demand its production. The verity of the recorded vote upon the poll-books, and a certificate of that result, is the unquestioned duty imposed by the statute of Kentucky on the county board. It is undoubtedly a ministerial duty. The correctness of the true vote as cast becomes the test of fidelity with which this duty is discharged. How does such a board become *functus officio* from merely entering upon the discharge of its duties, until the responsibility confided to it has been discharged by a certificate of the result as exhibited upon the face of the poll-books? I have always believed that wherever the law imposed upon an officer a ministerial duty, to be performed within a certain time for a public purpose, it has always been construed as directory only; and though it were not performed within the prescribed time, yet if afterwards performed, third parties or the public could not suffer from the delay.

Is it possible that gentlemen will cavil at a principle of law so plain and so well established? Did our State board do right in repudiating it? Are they sustained by well-established legal precedent and authority? I think not. The sitting member and the majority seem to think that the high character of the board should induce us to acquiesce in the legality and propriety of their decision. I cannot concur in this position. The brightest and purest judicial luminaries have been reversed in their decisions. I deny it. I have as much respect personally for the gentlemen constituting that board, and as much confidence generally in their legal abilities, as the sitting member himself. I know them all personally, and I know them well. I bear testimony to their high character as men and as lawyers. I am equally well persuaded that their ruling in this case was wrong, and that their judgments in this matter have been eclipsed by party bias. The best lawyers are but human, and often err. They are creatures of human frailty and party impulse. Attorney General Harlan, a distinguished member of this board, gave a written opinion, upon the eve of an exciting election, a few years since, when officially called upon, that a foreigner could not vote in our State until after a year's residence subsequent to the time when his naturalization papers had been issued. That opinion was promulged throughout the State, with the broad impress of the attorney general's justly earned, official, and professional reputation; but a case involving this principle was carried to our appellate court, and the gentleman knows that the opinion of the attorney general was repudiated. Yet that did not detract from the ability of the attorney general.

But I maintain that this State board themselves are estopped from denying the position I maintain by their former action. I say that such was not their opinion in regard to the election of Wheat and Bullitt two years ago. In order that I may not do injustice to these gentlemen, I will read to the House what their opinion was then. An election was held for one of the judges of the appellate court of Kentucky, and this same board received the several returns from the county board, but there were several mistakes in these returns, and the intimation then was by this board that such amendments could be made. The returns first sent by the clerk from Hart county stated the vote to be, for Wheat 122 votes. It turned out, by an amended certificate, that a mistake of just 100 votes was made, and that it should have been 222 votes; yet this board received the amended returns, and corrected the mistake accordingly.

Mr. MOORE, of Kentucky. I ask my colleague to state whether, in this instance, there were not two copies made by the clerk, one sent by mail and the other by private conveyance; and whether one did not contain the vote as 122, and the other as 222; and whether the board, ascertaining that the latter was correct, did not so certify it?

Mr. STEVENSON. That makes no difference whatever, so far as the point under discussion is concerned. If the county board was *functus officio*, they had no authority to change the return first sent. But a mistake was discovered which the examiners corrected, and sent it on to the State board, which received and allowed the larger instead of the smaller number.

Mr. MOORE, of Kentucky. They did not correct it at all. Both copies were made out at the same time, and were, to all intents and purposes, the same returns. One contained a mistake which they corrected by the other.

Mr. STEVENSON. My colleague is mistaken. This is their record made in that case:

"In the copy of the returns first sent by the clerk from Hart county the vote was stated to be, for Wheat 122 votes, and for Bullitt 396 votes. The corrected copy by the clerk, and

also the certificate by the examiners, shows the vote to be as above cast, namely, for Wheat 222 votes, and for Bullitt 396. The first certificate sent from the county of Nelson stated that the vote was, for Wheat 457 votes, and for Bullitt 621 votes. An amended certificate was sent by the examiners, which states that there was an error in the first in omitting to include the vote in Bloomfield precinct, No. 3, which, when given, made the vote as above, namely, 525 votes for Wheat, and 694 for Bullitt. A note was also received from the clerk of Meade, stating that a mistake of twelve votes was made by the examiners against Mr. Bullitt, in not adding that number to his vote, and that he would reassemble the examiners and have the correction made. ***But sufficient time having elapsed to have the mistake corrected,*** if it existed, and as it could in nowise change the result, the board did not think it expedient to make longer delay for that purpose."

The first returns from Nelson contained an error in omitting one entire precinct. The county board corrected this error by an amended certificate. How could they do this, if they were *functus officio?* Why did the State board receive it? Was not the reception by this State board of that amended certificate from the county of Nelson in direct antagonism with their action in this case? How does the majority justify this inconsistency?

I appeal to this house to say, if the Nelson county board had the right in that case to correct their count by an amended certificate, why the county boards had not the same right in this instance? Again, the State board expressly admit they had waited some time for an amended return from Meade. Why, if the county board was *functus officio?* Why did the State board wait for a return that the county board of Meade had no power to make? Can any one doubt it would then have been received? I pause for a reply. I do not speak to you, gentlemen, as partisans; I speak to you as lawyers, as upright men. Here I have given you one instance where this same State board very properly, as I think, allowed amended certificates of the corrected result of the poll-books to be sent in after the third day after the election, in the case of an election of appellate judge. If the principle of *functus officio* is good law now, why was it not asserted then? The elective franchise is a bauble if the action of the State board is to become an established precedent. Such a rule of decision would disfranchise every man in every congressional district in Kentucky. I say it cannot be sustained in law.

Mr. DAWES. Mr. Speaker, I have listened with a great deal of interest to the gentleman's argument. It is a very able one; but, sir, I fail to see its application to this case, when the whole committee, the majority as well as the minority, have gone right behind that certificate and examined into the question of how many voted and offered to vote at the several precincts in that congressional district, and have themselves counted on one side and on the other every legal vote offered in that district. Now, sir, because the majority of the committee have come to the conclusion that the State board did right when they came to give the certificate; did right in counting only the votes returned according to the provisions of the law; votes returned in the manner and at the time prescribed by law, the certificate itself not being conclusive—being only *prima facie* evidence of the right to a seat—the committee all agreeing that, notwithstanding that, it is their duty to go behind that certificate and to decide for themselves which of these two men has been legally elected, regardless of the certificate, it is, I repeat, hardly justice to the committee to say that no matter what frauds are committed, no matter what may be the voice of the district, unless that voice happens to be returned at a particular time and in a particular way, the majority hold that the district is to be disfranchised. No such position is claimed by the majority of the committee. On the other hand, they repudiate it. They base their report and their conclusions entirely, whether just or unjust, whether satisfactory or not to other members of the House, upon the ground that the majority of the legal voters in that district cast their votes for the sitting member. They have said that they thought the State board, in discharging their function of counting the votes and giving certificates, were confined to those votes returned to them at a particular time and in a particular way prescribed by law, but that, nevertheless, our duty was quite another one.

Mr. MILLSON. The gentleman from Massachusetts has referred to what has been a subject of doubt with me. It would seem to be the view of the majority, as well as of the minority of the committee, after an inspection of the return, that that return, upon its face, would give the seat to the contestant.

Mr. DAWES. I stated a few moments since, when interrupting the gentleman from Kentucky, and I do not know whether the gentleman from Virginia was in or not, that the majority of the committee did not admit that to be the fact. The majority of the committee claim that an inspection of the returns and a correction of all mistakes would still leave a majority for the sitting member. There was a glaring mistake which attracted the attention of the friends of the contestant first, and no other mistake was disclosed until after they went into the investigation, and this mistake corrected, as my friend from Kentucky says, would leave the contestant entitled to the seat by seven majority. A further examination, however, showed other mistakes patent upon the face of the poll, and to which the attention of nobody had at first been attracted. There were mistakes made in counting up columns, and in other ways, and the majority of the committee claim that, on a correction of all the mistakes, the sitting member is shown to be entitled to his seat.

Mr. MILLSON. I would inquire of the gentleman whether the votes stricken from the polls were stricken from the polls by a vote of the committee sitting in judgment on each vote returned?

Mr. STEVENSON. I will answer my friend from Virginia, and I will correct the mistakes of both of my friends [Messrs. Dawes and Stratton] on the Committee of Elections. I will leave it then to the House to say whether I am right or wrong in my legal deductions. I say that if you count the recorded vote as it appears on the poll-books, change no vote, and make no additions, but look to all the amended returns of the county boards, the contestant is entitled to the seat now occupied by the sitting member. The State board, in their certificate, say so. Understand my proposition, and we cannot disagree. I say that the State board would have given the contestant the certificate upon the amended returns made to them if they had been of the opinion that the county boards had the right to correct errors, or the State board possessed the authority to receive these amended returns. The gentleman from Massachusetts [Mr. Dawes] says that he admits that; and that is all my friend from Virginia desired to know.

Mr. DAWES. I do admit that at that time, and at the time the State board gave their certificate, one mistake was pointed out. The other mistakes developed themselves in the course of the investigation. Only one mistake was pointed out to the State board before they granted their certificate, and this was after the county canvassers had made their returns; but there were other mistakes quite as apparent, so soon as a man put his eyes upon the place where they existed. If the State board had had all the mistakes pointed out to them, it is the opinion of the majority of the committee that they must have given the certificate to the sitting member.

Mr. MILLSON. I want to know whether the committee, by its own act, determined upon the validity or legality of the votes rejected?

Mr. DAWES. I am rather discharging the duty of my colleague, to whom this case was intrusted by the committee; but I will reply to the interrogatory of the gentleman from Virginia. The committee first passed upon the correction of the polls, and they came to the conclusion, as stated in the report, that correcting the polls, without regard to the question whether votes were legal or not, would leave a majority of seven votes for the sitting member. They then took up the lists of the sitting member and the contestant, and passed upon the several challenges in the manner referred to in the report.

The House adopted the resolution reported by the committee, declaring Mr. Anderson, the sitting member, entitled to the seat, (June 18, 1864)—Yeas 112, nays 61.

NOTE.—The debate will be found in the Congressional Globe, volume 42. For the report: Mr. Stratton, p. 3075; Mr. Anderson, p. 3079; Mr. Dawes, p. 3127; and Mr. Stratton, p. 3131. Against the report: Mr. Chrisman, p. 3077; ditto, p. 3123, and Mr. Stevenson, p. 3125.

THIRTY-SIXTH CONGRESS, SECOND SESSION.

HARRISON *vs.* DAVIS, *of Maryland.*

The sitting member took his evidence before two justices of the peace, the other officers named in the act of 1851 refusing to take his evidence on the ground that their other official duties would not permit them to do so. Held, that the law was complied with.

Certain judges of the election, friends of the contestant, and apparently by concert, withdrew from the polls at an early hour. Held, that the validity of the election was not affected.

The contestant alleged intimidation and violence at the polls. The committee held that as there was no such display of force as ought to have intimidated men of ordinary firmness, and as the election was not arrested, it should be held valid.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 31, 1861.

Mr. GILMER, from the Committee of Elections, made the following report:

That the contestant has shown no ground to disturb the sitting member.

At the outset of their investigation they were met by the objection of the contestant to the whole evidence taken by the sitting member, that it was not taken before a judge of the United States, or a chancellor or judge of a court of record of the State, or a mayor of the city, but before two justices of the peace.

The affidavits of the counsel and agents of the sitting member showed that immediately after the notice of the contestant was brought to the knowledge of the sitting member, application was made in his behalf to the officers first named, living in the district, who all refused to take his evidence on the ground that their other official duties left them no time for this purpose.

Thereupon the sitting member was reduced to the alternative of taking his evidence under the 10th section, or not at all.

We think the case is within the section, and that his evidence is regularly taken.

When objection was made to his evidence, the sitting member insisted on his exception to the contestant's evidence for want of due notice.

The notice was left at Mr. Davis's house, in Baltimore, on the 24th of January, 1860. Mr. Davis never saw it till the 3d or 4th of February. He had left Baltimore with his family, and had been residing in Washington ever since the 2d of December, and the contestant knew the fact, for on the 2d of December he served his notice of contest on Mr. Davis in Washington. It was wholly accidental that Mr. Davis received any knowledge of the notice for taking evidence at all; and when he did get it, only *two days* intervened before the day named for taking the evidence, and the sitting member's answer to the notice of contest having been served on the 29th of December, the time for taking evidence expired by law on the 27th and 28th of February. The sitting member served his notice on the 13th of February to take evidence on the 24th of February. Mr. Davis thus had only ten days to examine the list of the contestant's witnesses, ascertain what they might be called to prove, and to hunt up evidence to meet them—a period of time wholly inadequate for that purpose; and even that short time taken for the purpose left him only *six days* in which to take his whole evidence.

We think Mr. Davis justly complained that the law of notice was evaded and not complied with, and that he was deprived of all opportunity intended to be secured him by law to meet the case against him. The consequence was, that Mr. Davis was able to take but little evidence, and was wholly deprived of all opportunity of producing rebutting evidence to disprove particular statements adduced against him. He, however, waived all objection to the contestant's evidence on the above grounds, and requested that the case might be heard on the merits.

The committee find it difficult, from the grounds of contest, to ascertain the case really intended to be made.

The statement sets forth fifteen specifications; but most of them are vague imputations, having no legal bearing on the validity of the election. There is a general failure of proof as to all of them; and all were abandoned by the contestant's counsel in argument, except so much of the first as relates to violence, intimidation, and exclusion of voters from the polls.

Still it will illustrate the nature of the case, and the spirit with which it is prosecuted, to state briefly the grave and scandalous imputations cast by the petition on great numbers of gentlemen, which are not only not proved, but many not even attempted to be proved, and *all* abandoned at the argument of the cause.

The second specification, that various publications in newspapers tended to excite to the outrages alleged, is wholly without proof, and is irrelevant, if proved.

The third specification, that prior to the election various speeches were made by the sitting member which had a like tendency—which, in his reply, the sitting member declared "a malicious libel"—is wholly destitute of proof: is disproved by the alleged speech produced, and, if true, could have no legal effect on the result.

The fourth is merely a repetition of the second and third.

The fifth complains that the city authorities refused to inform the citizens what preparations had been made to secure a fair election; but the proof shows that ample arrangements were made; that persons who called were so informed by the mayor; and if they had not been, it was information they had no right to ask. This curiosity may well have been prompted by a desire to counteract or evade them, or to increase excitement by pronouncing them insufficient, and the evidence tends to show that such use was made of the just reserve of the mayor.

The sixth is a general impeachment of the conduct of the police, or some portion of it, on the day of election; but since it is not essential that there should be any police to make an election valid, we do not perceive the relevancy of the specification; and a shorter remedy was nearer home, by an appeal to the grand jury, which. however, does not appear to have been invoked.

The seventh specification impeaches the conduct of a "large majority" of the judges of election for neglecting their duty; and the eighth says that the few who wanted to do their duty were compelled to receive illegal votes, and in many instances were compelled to leave the polls.

These, if proved, would be decisive of the case; but here, as elsewhere, the only purpose of the specification seems to be to cast slurs on political opponents. The proof utterly fails, and there is no attempt to impeach the conduct of the judges by any evidence worthy a moment's consideration; and their conduct must be considered as legal and fair in the absence of any fact tending to show the contrary of each individual judge.

The ninth specification alleges that John Hinesley usurped the position of judge without color of authority, and violently assaulted Thomas T. Martin, a judge, and expelled him from the poll-room; but there is no evidence to question Hinesley's right to act as judge; and the assault on Martin, if it was without provocation, is certainly immaterial to the validity of the election.

The thirteenth specification, that there was no legal notice of the election; and the fourteenth, that the judges were illegally appointed—either fatal to the election—are as entirely destitute of proof as they were susceptible of proof, if true. Why they were inserted it is wholly impossible to divine.

The fifteenth specification is wholly novel in its character:

15. That at the said election held in the said fourth congressional district on the first Wednesday of November, eighteen hundred and fifty-nine, the majority of the legal votes polled at the various polling places, while any degree of fairness, peace, and order prevailed, was in my favor; and I claim that all fraudulent and illegal votes, and votes obtained by force, given for you, be rejected, and also that votes given for you after your political friends had taken forcible possession of the polls, and excluded and prevented from voting those who intended to vote for me, be rejected and not counted; and I claim that the majority of the legal votes cast, under such circumstances as to authorize them to be counted and included, was given to me.

Such an analysis of the votes, according to the time of day when they were cast, we suppose to be not admissible, and, indeed, in itself impossible; and were it possible, there has not been the slightest attempt to prove it by testimony.

It remains to consider the first specification, which is in the following words:

In pursuance of the act of Congress of February 19, 1851, I hereby specify the grounds on which I rely, which are as follows:

1. That certain political clubs or associations of men, intending unlawfully to carry the election in your favor by force, fraud, and violence, combined and conspired, and agreed among themselves to exclude and obstruct legal and qualified voters, who intended to vote for me, from exercising the right of suffrage; and in pursuance of that combination and agreement did, on the first Wednesday of November, eighteen hundred and fifty-nine, the day of the election in the fourth congressional district, in the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, and 20th wards of the city of Baltimore, which said wards form the fourth congressional district of Maryland, and in each of said wards, assemble, many of them armed with deadly weapons, around the polling places and in the avenues leading thereto, and by threats intimidated, and by force and violence obstructed and drove away

from the polls thousands of legal electors who intended to vote for me, and many of whom endeavored so to vote, but were, by the causes aforesaid, prevented from depositing their votes for me; that by intimidation and the causes aforesaid many voters were deterred from approaching the polls of the said several wards, who would have voted for me, and who intended so to vote; that in each of the said wards many persons voted for you who were not legally entitled to vote, and many of them voted for you more than once; that in each of the said wards certain persons, who desired and intended to vote for me, were by force and violence compelled to vote for you, and did so vote, because of their reasonable fear of personal injury; that tickets with your name on them, peculiarly striped and particularly marked, were prepared and used in the said election, thereby violating the election laws, and destroying the privilege of voting by ballot; that in one of the said wards, being the 15th ward of said city, an attack was made by persons supporting you and endeavoring to secure your election upon some of my supporters, immediately before or at about the time of opening the polls in said ward, and one of them was cruelly and brutally murdered, and another wounded and injured, and others injured in said ward; that in other wards immediately at the time of opening the polls, or shortly thereafter, or during the election day, attacks were made by persons who supported you and were endeavoring to secure your election upon those who had or intended to vote for me, in some cases with fire-arms, and in other ways, with a view to drive some of them from the polls, to prevent some others from voting for me, and to deter others from so doing; that many supporting me were beaten and maltreated and most cruelly used on the said election day; and that by the causes aforesaid such a result was produced as to prevent the possibility of having a free, fair, peaceable, or proper, or legal election; and that the said election was not such an one as to enable the majority of voters in the said congressional district to vote according to their free and unbiassed preferences, wishes, and choice.

So far as we are able to comprehend this specification, it seems, in substance, to say, first, that in all the wards of the 4th congressional district numbers of men assembled, and by violence and threats drove from the polls, or deterred from approaching the polls, thousands of voters who intended to vote for the contestant; and second, that *many* persons voted for the sitting member not entitled to vote; that many voted for him more than once; and that many who intended to vote for the contestant were compelled to vote for the sitting member by reasonable fear of personal injury.

The residue of the statements seem mere repetitions or statements of details, covered under one or other of the two heads above mentioned, or matters of aggravation, having no legal bearing on the case.

The conclusion of the specification is, that it was not a fair, free, peaceable, or legal election, and that it was not such an election as enabled the majority of voters in the district to vote according to their free and unbiassed preference, wishes, or choice.

The specification is very loosely drawn, and confounds matter wholly dissimilar. Only two questions can ever arise touching an election: (1) Was there an election? If there was, then (2) who had the majority of votes?

If there were *no* legal election, it is wholly immaterial how many votes were cast; whether they were legal or illegal, or who had a majority of them.

The statements of violence, and exclusion, and intimidation of thousands in the specification, are the foundations for the conclusion of the specification that there was no legal election. It is, therefore, wholly irrelevant to say that illegal votes were cast, no matter how or for whom. The proof of illegal votes is only material after the legality of the election is proved. It is proof which goes to the question of the majority, and that can never arise till it has been established that there has been no *election*.

The case would be different were it alleged and proved that the illegal votes were received collusively by the judges, for that would avoid the election for fraud; but there is no such allegation, either in the first or any following specification; it is not, therefore, a point for consideration, even were there proof tending to establish it; but we are of opinion that there is no evidence which established any misconduct in the judges of any ward tending to affect the legality and validity of the election in any ward. On the contrary, the proof is ample, both on the part of the contestant and on the part of the sitting mem-

ber, that the election was fairly and legally conducted by the judges charged to hold it.

It is true that certain of the judges, *favorable to the contestant*, did, apparently by preconcert, at an early hour of the day, and when it was apparent that their candidate was probably beaten, desert their duty and withdraw from the polls; but the proof discloses no excuse for this conduct; the law allows the remaining judge to conduct the election; and this withdrawal can, therefore, have no effect, legal or moral, on the validity of the election.

We are, therefore, bound to consider the appointment and the conduct of the judges legal, and their returns valid, touching the number of votes actually cast, and the legality of the votes so certified, till the contestant, by legal evidence, proves in detail, first, that certain persons were not entitled to vote; second, that those persons voted for the sitting member; and, third, that those illegal votes suffice to give him the majority.

This, it was formally stated by the defendant's counsel, could not be done, and was not contemplated. Indeed, while there was frequent reference to the subject of illegal voting by the counsel for the contestant, he formally declared that he rested the case wholly on the evidence of violence and intimidation for the purpose of avoiding the election; but he seemed not to be aware that illegal voting could have no effect on the question whether there were any election at all.

* * * * * * *

The committee here cite a large part of the evidence in the case. The report continues:

We have now to consider the question whether the election is void by reason of riot and intimidation. The specification is, that *in all the wards bands* of men conspired to exclude and obstruct legal voters who intended to vote for the contestant, and did, in fact, assemble at and near the voting places armed, and by threats intimidated and by violence obstructed and drove away *thousands* of legal voters, and deterred many from approaching the polls.

That statement, considered as an allegation of facts which, if proved, avoid the election in point of law, is wholly insufficient.

It nowhere makes the formal allegation that the law requires: either that the election was arrested and broken up in every ward, or that so many individuals were excluded by violence and intimidation as would, if allowed to vote, have given the contestant the majority.

Either of those grounds, if stated and proved, would have been, in law, decisive of the case; but neither is stated in the specification, and neither is proved by the evidence.

The case attempted to be made is one wholly different from either, and wholly unknown in the annals of election law.

It assumes that an election is necessarily void at which 2,000 voters are prevented by violence or threats of violence from voting—though the election was never arrested, and though twenty thousand may have been cast, and all for one candidate, which is absurd. Why not attach the same result to the exclusion or intimidation of 500, or of 100, or of one? The principle is the same. In the last as in the first case *all* do not express their choice by reason of violence or threats of it. In neither would the votes excluded have varied the result if cast. The principle is the same—the number is accidental; the result is the same; the illegality is the same.

The allegation would be equally valid if asserted of the State of New York as of the half of the city of Baltimore. It might well be true that there were associated at every poll in the State to exclude by violence or intimidation the opposite party, and that they did exclude thousands. Yet 2,000 out of 500,000 would satisfy the allegation, and the exclusion of one or two persons at each precinct would make up the number.

And under the allegation in this case, 1,990 may have been excluded at one ward, and one at each of the other wards; and *this* is relied on to avoid the *whole* election at all twelve of the wards.

It is therefore apparent that there is no case stated to avoid either the whole election or any part of it. It is not stated that the combination anywhere arrested the election, nor anywhere made such a display of force as ought to have intimidated men of ordinary firmness; still less is either of these material facts alleged to have occurred *at all*, or at a majority of the wards, nor is it stated that so many as a dozen men in the whole district approached the polls and offered to vote and were repelled, or attempted to approach, and were repelled.

[The report closes as follows:]

Such a case, supported by such testimony, discredited by such circumstances, and failing in every material allegation, conducted by a political association in the name of the contestant, and inspired in great measure by personal malice against the sitting member, manifested by the libellous allegations of the petition, disproved by the testimony taken to support them, ought to be treated as a vexatious prosecution, and rebuked by the judgment of the House.

The committee, therefore, report the following resolution:

Resolved, That the sitting member, Hon. H. Winter Davis, is entitled to his seat in this Congress.

The case was not taken up for consideration in the House.

THIRTY-SIXTH CONGRESS, SECOND SESSION.

PRESTON *vs.* HARRIS, *of Maryland.*

In this case there were sweeping allegations of fraud, but the evidence was held to be insufficient.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 27, 1861.

Mr. MCKNIGHT, from the Committee of Elections, made the following report:

The allegations of the contestant are sweeping in their character, vague, general, and unsustained by the evidence in the case. Many of them are insufficient in law, even if supported by proof; and such of them as might be held valid in law are not shown to be true by the testimony. The case of the contestant, both upon the law and the testimony, fails to affect the right of the sitting member to his seat, which the committee unanimously decide him to be entitled to hold.

For greater facility of review, the notice of the contestant to the sitting member, setting forth these allegations, is subjoined:

PLEASANT PLAINS, BALTIMORE COUNTY, MD.,
November 30, 1859.

SIR: You are hereby notified that I intend to contest your election as a representative in Congress from the third congressional district of Maryland to the 36th Congress of the United States.

In said contest I shall rely upon the following grounds:

First. That the election alleged to have been held for a representative in Congress, on the first Wednesday of November, 1859, in that part of the city of Baltimore which constitutes a portion of the third congressional district of Maryland, is null and void, because the judges of election who professed to hold the same were not legally qualified to act, nor was said election held pursuant or according to the laws of the land.

Second. That if said election in said portion of said congressional district was held by judges legally qualified to act and hold the same, said election in the first, second, third,

fourth, fifth, sixth, and seventh wards of said city of Baltimore was illegally and improperly conducted; that within said seven wards and on said day, by reason of violence, and with the aid and use of fire-arms, deadly weapons, and instruments of torture, illegal combination, fraud, conspiracy, collusion, obstruction, intimidation, breach of the peace, bloodshed, and murder, a large number of legally qualified voters who desired to vote and would have voted for me were prevented from exercising the right of suffrage, while other persons not legally qualified to vote were permitted to vote and did vote for you; each or many of said last-mentioned persons voting for you in the same ward, or in different wards of the said seven wards, several times on said day.

Third. That many persons legally qualified to vote, and who, if left to the free and legal exercise of their rights, would have voted for me, were unlawfully seized, confined, and forcibly carried to the polls within the said seven wards, and there, under terror of death or great bodily harm, compelled, against their wills and conscientious sense of right, to vote, and did so vote for you.

Fourth. That for the purpose of carrying into effect, within the said seven wards, the outrages hereinbefore mentioned, tickets with your name thereon, peculiarly shaped and particularly marked, were prepared and used, thereby violating the spirit of the election laws, and utterly destroying the privilege of secret ballot.

Fifth. That in the portion of the third congressional district composed of the eighth ward of the city of Baltimore, and the eighth, ninth, tenth, eleventh, and twelfth election districts of Baltimore county, wherein, upon said first Wednesday of November, 1859, said election was conducted fairly, properly, and legally, I received of the whole of the votes cast for the place of representative in Congress a majority of one thousand four hundred and thirteen votes, in virtue of which majority I claim to represent the third congressional district of Maryland in the 36th Congress of the United States.

Sixth. That upon the said first Wednesday of November, 1859, I did receive within the third congressional district of Maryland a majority, or the largest number, of the whole of the legal votes cast for the place of representative in Congress from said district, and therefore claim to represent said district in the 36th Congress of the United States.

I am, sir, very respectfully, your obedient servant,

WM. P. PRESTON.

Hon. J. MORRISON HARRIS.

The first allegation, that the judges who conducted the election in that portion of the city forming part of the congressional district, and in which the great mass of the whole vote was polled, were not legally qualified to act, has no force whatever outside of its mere statement by the contestant in his notice of contest; for not only is it absolutely contradicted by the sitting member, but the contestant has not even attempted to sustain it by the production of a particle of proof. So also fails the subsequent allegation that the election was not held pursuant to the laws of the State.

Upon the allegation that such a condition of lawlessness and riot prevailed in the seven city wards that gave heavy majorities for the sitting member, the committee believe that while there is some conflict of testimony as to individual cases of violence and obstruction of voters, no such condition of things is anywhere shown to have existed as to justify the rejection of any of the sitting member's majorities in any of the specified wards, or at all to bring the case within the recognized ruling of the law of elections as to riots. It is proper to remark, in this connexion, that in the argument before the committee, while the sitting member expressed his great regret that anything objectionable should have marked the conduct of the election anywhere in his district, the contestant frankly and in the fullest manner exonerated Mr. Harris from any suspicion of encouragement or knowledge of any matters complained of.

The committee refer here to the law upon the subject of election riots, that the testimony in the case may be compared therewith. The only cases in which elections have been set aside for this cause are where there was riot at the polls, or such tumult as interfered with the election, and prevented an ascertainment of the result.

This rule is laid down in 2d Hayward on County Elections, pp. 580, 581, 582, 584. This was a case where a riot occurred at the polls, that led to the assault of the high sheriff in the execution of his duty, *and was of such a character as led to the closing of the poll*, and the election was set aside on this ground and the illegal conduct of the high sheriff.

Another case will be found in 1 Rowe on Elections, p. 334, where there was uch riot and tumult as to interrupt the election.

And another case, in Sheppard on Elections, pp. 105, 106, where it was held that *if riots are carried to a great extent*, accompanied with personal intimidation, so as to exclude the possibility of a fair exercise of the franchise, they will avoid the election; as where, in this case, the *returning officer, being alarmed by the mob, offered to return whoever the sitting member chose to name; and he indicating himself, the sheriff returned him.*

And it is further laid down in 4 Selden, pp. 93 and 94, that, "*should a gang of rowdies gain possession of the ballot-box before or after the canvass of the votes, and destroy the whole or a portion of the ballots, or introduce others into the box surreptitiously, so as to render it impossible to ascertain the number of genuine ballots, the whole should be rejected.*"

Also, in 1 Peckwell, p. 77, which was a case of "the most enormous and unexampled riots;" and it was proved that the mayor was applied to to bring in the military to quell them, *and the poll was stopped, and not resumed until quiet was restored.* The same law is laid down in Heywood on Elections, pp. 580, 581, 582, 584; also in Rowe on Elections, p. 334; also in Sheppard on Elections, pp. 105 and 106; also in the celebrated Westminster cases and the Pontefract case.

Now, it is very clear, from the evidence, that no such condition of things existed in the case under consideration. At every one of the polling places in the district of the sitting member the election was uninterrupted; the votes were all quietly canvassed; the judges signed the returns; they were transmitted, as the law requires, to the governor of the State; the governor made proclamation of the result, and transmitted to the sitting member a certificate of his due election. He is, therefore, in his seat under all the observed solemnities of the laws of Maryland.

The proof as to the facts of the case is contained in the testimony of twenty-three witnesses, thirteen of whom were produced on the part of the contestant, and ten on the part of the sitting member. The testimony of the contestant is very general and sweeping, instancing individual cases of assault and violence, but breaking down upon cross-examination. In the points most material to have been established by the contestant, viz: the exclusion, by violence, of a sufficient number of his friends shown to have been competent voters, and the deposit and counting, for the sitting member, of votes established to be illegal, the case fails utterly. An analysis of the whole testimony of the contestant does not show the exclusion of twenty legal voters who made reasonable efforts to vote; and not one dozen illegal votes are shown to have been cast and counted by the judges of election for the sitting member. Indeed, upon the point of illegal voting, the case is established in favor of the sitting member, not only by the inability of the contestant's own witnesses to prove the fact, and the general testimony against such an allegation by the witnesses of the sitting member, but by the direct testimony of the judges of election of both political parties. * * * * * * *

The claim made by the contestant, that the returns from all the precincts in which the sitting member received majorities shall be rejected, and those alone held valid from the single city wards and three county precincts in which the contestant had a majority, would be a simple but not a justifiable mode of reaching a result. In fine, the committee do not find anything in the testimony or the law of the case to justify any other conclusion than that the sitting member was duly elected and properly holds his seat, which result they reach without difficulty.

The case was not reached in the House.

THIRTY-SEVENTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. DAWES, Massachusetts.
VOORHEES, Indiana.
MCKEAN, New York.
LOOMIS, Connecticut.
BAXTER, Vermont.
Mr. WORCESTER, Ohio.
BROWN, Rhode Island.
MENZIES, Kentucky.
PATTON, Pennsylvania.

SHIEL *vs.* THAYER, *of Oregon.*

The constitution of Oregon has fixed beyond the control of its legislature the time for holding an election of representative in Congress. The contestant having been elected on the day fixed by the constitution, the committee held that he was entitled to the seat. The House adopted the report.

IN THE HOUSE OF REPRESENTATIVES,

JULY 26, 1861.

Mr. DAWES, from the Committee of Elections, made the following report:

The questions raised before the committee by both contestant and sitting member, and, after a full discussion, submitted by each for their determination, have been entirely matters of law and not of fact.

The contestant rests his claim to the seat upon an election held in Oregon for representative in the 37th Congress on the first Monday in June, 1860, at which election it is admitted that he had a majority of all the votes cast.

The sitting member rests his claim to the seat upon two grounds: 1st. That there is no law in Oregon providing for the election of a representative in the present Congress, and, consequently, that the election on the first Monday of June, 1860, being without law, was void. 2d. That the right of the people of Oregon to representation in Congress is a constitutional right, of which they cannot be deprived by the neglect or refusal of the legislature of the State to provide by law for an election; and that the legal voters of the State, in the exercise of that right, did assemble on the sixth day of November last, the day of the presidential election, and cast their votes for him as their representative, and that he now holds his seat by virtue of said election.

It is very evident that whether the last position taken by the sitting member be correct or not, if he is mistaken in the first, there was in November last no opportunity for the exercise of that constitutional right on the part of the people of Oregon. If the election held on the first Monday of June, 1860, at which the contestant received a majority of the votes, was held in pursuance of law, then the door was closed, and he is entitled to the seat.

The committee are of opinion that the election held for representative in Congress on the first Monday in June, 1860, was held in pursuance of, and in conformity with, the constitution and laws of Oregon, and that, consequently, the contestant is entitled to the seat.

The people of the Territory of Oregon, on November 9, 1857, adopted a constitution and applied for admission into the Union. They were admitted as a State, under that constitution, on February 14, 1859. In that constitution it is provided, article 2, section 14, that "general elections shall be held on the first Monday of June, biennially;" and in article 18, the schedule, section 6:

"If this constitution shall be ratified, an election shall be held on the first Monday in June, 1858, for the election of members of the legislative assembly, a representative in Congress, and State and county officers; and the legislative assembly shall convene at the capital on the first Monday in July, 1858, and proceed to elect two senators in Congress, and make such further provisions as may be necessary to the complete organization of a State government."

The constitution having been, as before stated, adopted by the people in November, 1857, in pursuance of the foregoing provision, an election was held on the first Monday of June, 1858, at which a representative in Congress, the honorable Mr. Grover, was elected, and a legislative assembly, which met at the capital on the first Monday in July, 1858, and chose two United States senators, Messrs. Lane and Smith. On the admission of the State into the Union, February 14, 1859, Mr. Grover took his seat in the House of Representatives, and Messrs. Lane and Smith theirs in the Senate, by virtue of these elections. Mr. Grover's term of office expired on the 4th of March following.

By another provision of the same schedule, section 7, it is provided that "all laws in force in the Territory of Oregon when the constitution takes effect, and consistent therewith, shall continue in force until altered or repealed." It was enacted by the territorial legislature in 1845 that "a general election shall be held in the several election precincts in this Territory on the first Monday of June in each year, at which there shall be chosen so many of the following officers as are by law to be elected in each year; that is to say, a delegate to Congress, members of the territorial council and house of representatives, judges of probate, district attorneys," &c.

The committee are of opinion that the "general election" provided for in the constitution, to be held once in two years, on the first Monday in June, was designed to embrace at least all such officers as were to be voted for by the people of the whole State, including a representative in Congress; and that, inasmuch as the same constitution provided for the first of those elections, including by name a representative in Congress, on the first Monday in June, 1858, an election should be held at the next general election in 1860 for a representative to the Congress next to be held after said election, that is, to the present Congress; and that the contestant, having at that time received a majority of the votes cast, is duly elected.

The committee would have had no difficulty in coming to this conclusion had it not been for the action of the legislature of Oregon upon this subject. Notwithstanding this constitutional provision that general elections shall be held on the first Monday of June biennially, the legislature of Oregon seems to have believed that it had power to fix another time for the election of representative in Congress. On the 1st day of June, 1859, a law was enacted providing for the election of a representative in Congress on the 27th day of June, 1859. By virtue of an election on that day, the honorable Mr. Stout received a certificate of election to the 36th Congress, and served during the term as such. At the session of the legislature in September last both branches acted upon the idea that notwithstanding this provision in the constitution of Oregon, the legislature had the power to fix another day for the election of a representative in Congress. A bill passed each branch fixing the day of the presidential election for an election of a representative in Congress once in four years, and for such election at the general election in the alternate years. But the two branches of the legislature differed upon the question whether it should apply to the election of a representative to the present Congress, and so the bill never became a law. Various reasons have been given for this action of the legislature, about which the contestant and sitting member widely differ. The committee have not deemed it necessary to determine what those reasons are, for, with all due respect to the opinions of the gentlemen composing that legislature, they are of opinion that this house must nevertheless be the final judge of the meaning of this clause

of the constitution of Oregon, so far as it touches the question under consideration. And for the reasons stated, the committee have no doubt that the constitution of the State has fixed, beyond the control of the legislature, the time for holding an election of representative in Congress at the general election to be held biennially, and that at such election so held in pursuance of the constitution the contestant was duly elected to the thirty-seventh Congress. They therefore report the following resolutions:

Resolved, That the Hon. A. J. Thayer is not entitled to hold the seat now occupied by him in this house as a representative from the State of Oregon.

Resolved, That George K. Shiel has been duly elected as a representative from the State of Oregon to the thirty-seventh Congress, and is entitled to a seat in this house as such.

The following extracts are from the debate in the House upon the case:

Mr. STEVENS. Mr. Speaker, I am not going to take part with either of these gentlemen, the sitting member or the contestant, for I think that neither of them has any business here, and I shall vote in accordance with that opinion. I offer the following as a substitute for the resolutions reported by the Committee of Elections:

"*Resolved*, That neither A. J. Thayer nor George R. Shiel is entitled to a seat in this Congress as representative from Oregon, and that the seat be declared vacant."

Now, sir, I will detain the House but a moment. I admit that the constitution of a State, when it is framed, may fix the time for the first election, because there is no other power to fix it, and that has been the practice; but I maintain that the constitution of a State cannot fix the day for any future election of representative in Congress. I understand one of these gentlemen to claim the seat by virtue of having been elected upon the day which he says was fixed by the constitution of Oregon—not the first election under that constitution. The legislature had not acted; and upon that ground he claims that the action of the constitution was good. Sir, if the constitutional provision was good, it would prohibit the legislature from acting in the matter through all time to come. The legislature would have their hands tied, and would not be able to fix the times and places of holding elections in that State. But the Constitution of the United States comes in and prevents any such action of the convention of that State, for it expressly provides who shall fix the times and places of holding elections for members of Congress. Here is the language of the Constitution:

"The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the *legislature* thereof."

Now, sir, I hold that no other power in a State has a right to prescribe it; and if the State legislature fails to fix the times and places, there is another provision of the Constitution by which Congress has the right to fix it, and I wish they would fix it, and fix it uniform throughout the United States. But I deny that the convention to frame the constitution of a State can fix the times and places for electing members of Congress, notwithstanding the provision of the Constitution which I have read.

I have brought the question briefly before the House, and I suppose everybody understands it and is ready to vote. I understand that the gentlemen interested have exhausted their desire to speak, and as the chairman of the committee will be entitled to be heard after the main question shall have been ordered, I now move the previous question.

Mr. MCCLERNAND. I hope the gentleman will withdraw the demand for the previous question for a moment, until I can have an opportunity to reply to the position he has taken. I will do it in five minutes.

Mr. STEVENS. I am afraid we shall not dispose of this matter to-day, and as I desire to get to other business, I will insist on the demand for the previous question.

The previous question was seconded, and the main question ordered.

Mr. DAWES. Mr. Speaker, I understand that the ground upon which the amendment is offered is simply this: that, in the absence of legislation in Oregon by its legislature, the constitution of Oregon having fixed the day upon which this election should take place, the House of Representatives is to say that the people of Oregon, acting through their constitution—the highest and the organic law of the State—cannot fix the time and place for holding an election. If there were a conflict between the action of the legislature of Oregon and its constitution, there might be some ground for the position which is assumed by the gentleman from Pennsylvania. But the organic law, that which rises above and swallows up all legislative action, having determined that this election should be held on a particular day and in a specific manner, and the legislature of Oregon having acquiesced in that by passing no law in conflict with it, it is assumed by the gentleman from Pennsylvania that it is proper for this house to say that the people of Oregon shall not, in that way and in that manner, declare how and when and where their representative shall be elected. It occurs to me, sir, that that provision of the Constitution of the United States which says that the time and place shall be specified by the legislature of each State, meant simply that they should be fixed by the constituted authority of the State until Congress itself should fix a time for the election in all the States. As Congress has not fixed that time, it has said to every State, "you may, by your constituted authorities, through whom you choose to speak

in your law, fix the time." Now, the legislature of the State of Oregon has acquiesced, if nothing more, in the time fixed by the constitution, the organic law of Oregon.

Mr. STEVENS. The organic law of Oregon is not definite. It fixes the first election, but not a word about any subsequent one.

Mr. DAWES. The organic law of the State says that all these general elections shall be held on the first Monday of June, biennially, and specifies what officers shall be elected on that day. Among them is a member of Congress. If, therefore, it is in the power of the State of Oregon, through its constitution, to say when this election shall be held, it has so said, it seems to me, as plainly as it could say it.

Mr. MCCLERNAND. I understand that the gentleman from Pennsylvania concedes the proposition that the convention was competent to invest the legislature with power to fix the time for holding the first election.

Mr. STEVENS. No, I did not state that. I say I believe it has been done. I doubt the authority altogether.

Mr. MCCLERNAND. That is a very different position altogether.

Mr. STEVENS. They had a right to fix the time for their general elections. I admit that.

Mr. MCCLERNAND. Then your position is that the convention was not competent to fix the time for an election.

Mr. STEVENS. It was competent to fix the time for general elections, but not for the election of a member of Congress.

Mr. DAWES. I was about to remark that the position of the gentleman from Pennsylvania is in the face of all the precedents of this house—precedents followed when Oregon herself was admitted into the Union; for the House then acknowledged, as a representative legally elected, a man chosen at a time and place not specified by the legislature of Oregon, but by the constitutional convention—in the same instrument that specified that his successor should be elected two years from that time.

The House of Representatives, in admitting my friend from the state of Kansas [Mr. Conway] as a representative on this floor, adopted this same construction of the powers of a State—that it could fix the time of election, either by their constitutional convention in their organic law, or by their legislature. My friend came here not by virtue of any election held at any time and place fixed by the legislature of the State of Kansas; and such is the history of all these new States.

It seems to me that there can be no ground for the House adopting the amendment to the report of the committee, offered by the gentleman from Pennsylvania. The sitting member does not claim to have been elected in pursuance of any law, or of any constitutional provision whatever, but on the general right to representation which the people have. The contestant is here by virtue of an election, at a time and place fixed in the constitution of Oregon itself; in compliance with which the legislature has forborne to this day to fix any other time and place.

Mr. THOMAS, of Massachusetts. Is it competent for the legislature of Oregon to fix the time and place of an election, in violation of the State constitution?

Mr. DAWES. If it is not competent for the legislature, in consequence of the constitutional provision, to fix a time, then the constitutional provision overrides the legislature of Oregon, and therefore it has performed this act itself.

Mr. THOMAS, of Massachusetts. If it overrides the legislature, does it also override the provision of the Constitution of the United States, by which the legislature is to fix the time of the election of members?

Mr. DAWES. Both of my colleague's propositions cannot, of course, be true. It cannot be true that the legislature of Oregon cannot fix the time of election because of the State constitution, and be also true that the constitution of Oregon cannot override the legislature, by reason of the Constitution of the United States. The two propositions cannot be true. Either the legislature of Oregon can, notwithstanding the provisions of the State constitution, fix the time of the election of members, because of the Constitution of the United States, or else the people of Oregon can do it through their constitution as well as through their legislature.

Now, the House may be prepared to depart from all its precedents. There may be other considerations. Of course, the Committee of Elections can have no feeling on the subject. They simply desire that the action of the House touching the grave and serious question of the right of members to their seats in this house shall be adjudicated solely on the law, without reference to any outside considerations. Moved solely by that consideration, the committee have unanimously come to the conclusion that there is a law in Oregon—that which has the highest sanction of law—fixing the time and place for the election of members of Congress, and that the contestant, in pursuance of that law, was elected to this house.

Mr. Stevens's amendment was rejected—yeas 37, nays 77.

The House adopted the resolution reported by the committee without a division.

NOTE.—The debate will be found in the Congressional Globe, vol. 45. For the report: Mr. Dawes, pp. 352, 357; Mr. Shiel, p. 354. Against the report: Mr. Thayer, p. 353; Mr. Stevens, p. 356.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

BUTLER *vs.* LEHMAN, *of Pennsylvania.*

Where the board of return judges certified to the election of a representative, and it was afterwards proved that one of the returns was a forgery, the governor of Pennsylvania took notice of the fact, and by proclamation declared the opposing candidate duly elected. The House sustained the action of the governor.

Where a recount of boxes sustained allegations of mistakes in the original count, the committee reported in favor of the contestant. The minority of the committee dissented, upon the ground that the identity of the ballot-boxes was not established, and that they had not been so kept as to rebut a reasonable presumption that they had been tampered with. The House refused to sustain the majority report.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 7, 1862.

Mr. LOOMIS, from the Committee of Elections, made the following report:

The first district of Pennsylvania is composed of the first, second, third, fourth, and seventh wards, and of the 1st, 2d, and 3d divisions of the fifth ward in the city of Philadelphia. Said wards are by law divided into election divisions or precincts for voting. There are fifty-one such divisions within said congressional district.

The election at each of said divisions is conducted by one judge and two inspectors, who are chosen annually; and in order to guard the rights of the minority, and to give to each of the two larger parties an inspector, the law of Pennsylvania wisely provides that each voter shall vote for but one inspector, and that the two persons receiving the highest number of votes shall be declared elected to that office. But in wards or divisions where one political party can give a majority larger than the entire vote of the other party, it has been the practice in said first district for the dominant party to divide their votes so as to elect both of the inspectors, thus evading the spirit and object of the law.

The law of Pennsylvania further provides that each inspector shall appoint one clerk to assist at the election, and upon application of twenty citizens the court of common pleas can appoint three watchers to be present at each precinct.

It is made the duty of the judge in every election division on the night of the election to make out and subscribe a certificate of the votes there given, and on the next day to file the same with the prothonotary of the court of common pleas, and to return a duplicate of the same to a meeting of all the judges and inspectors from the several divisions of the ward, who are required to ascertain the vote of the ward, and return the same by one of their number, duly elected by them as return judge for such ward, to a meeting of the board of return judges, to be holden at the State-house on the Friday next succeeding the election, whose duty it is to add together all the ward returns and issue the certificate of election.

The election out of which this contest has arisen took place on Tuesday, the 9th day of October, A. D. 1860.

Three persons were then voted for for the office of representative to Congress from said district, viz: William E. Lehman, (the sitting member,) John M. Butler, (the contestant,) and Edward King; and at a meeting of said board of return judges, held on the 12th day of October, 1860, according to law, it was certified in the manner provided by law that said John M. Butler had received eight thousand five hundred and eighty-one votes, (8,581;) William E. Leh-

man, eight thousand three hundred and eighty-three votes, (8,383;) and Edward King, two thousand and fifty-seven votes, (2.057;) and said John M. Butler was declared duly elected representative as aforesaid.

The board of return judges, in arriving at the result aforesaid, included a return from the fourth ward, made by one William Byerly, return judge of said ward, which return was afterwards proved to be a forgery, committed by said Byerly, for which he was tried, convicted, and sentenced in the court of oyer and terminer and quarter sessions of the peace for the city and county of Philadelphia, at the October session of 1860. Had the board of return judges received the true and genuine return from the fourth ward, instead of the forged one, they must have come to a different conclusion, and Lehman would have been declared elected by a plurality of 132 votes.

The then governor of Pennsylvania, (William F. Packer,) going behind the doings of the return judges, took notice of the fact of said forgery, and by proclamation, issued on the 8th day of November, 1860, declared William E. Lehman duly elected. Whereupon the contestant, on the 10th day of November, 1860, protesting against this act of the governor as an "illegal assumption," and reserving all rights which he might have under the certificates issued in his favor, gave notice to said Lehman of his intention to contest his seat, and specified particularly the grounds for such contest in accordance with the act of Congress in such cases made and provided, and on the 6th day of December, 1860, the contestant served upon said Lehman a supplemental notice with further specifications.

The contestant claims that the action of the governor before alluded to was illegal, and that he ought to have been admitted in the first instance as the sitting member, instead of Mr. Lehman; but the committee have not deemed it proper to determine this question, inasmuch as the House, on the first day of the session in July last, refused to allow the contestant to be sworn in as the sitting member, and decided this preliminary question in favor of Mr. Lehman.

The committee, therefore, consider that the only material question in the case is, who received the highest number of legal votes? (The printed evidence and papers will be found in Mis. Doc. No. 5.)

The sitting member rests his case upon the division returns, and claims to have received a plurality of 132 votes, as evidenced by those returns.

The contestant, on the other hand, denies the correctness of these returns, or some of them, and attacks them in two ways:

1. It is shown that the return from the eleventh division of the second ward, which gave Lehman 210 votes and Mr. Butler 31 votes, was never signed by the judge, as required by law.—(See Brightly's Annual Digest, sec. 33, p. 1096.) If this return should be rejected on account of said informality, it would make a difference in favor of the contestant of 179 votes, and would elect him. But the committee are of opinion that the votes, as returned, were really cast for the parties named, and that the objection is a mere technical one that ought not to prevail.

2. But the contestant relies mainly upon the claim that, in divers divisions and wards, the division returns did not contain a true statement of the ballots actually deposited in his favor, and in his notice of contest he specifies that the election officers in the 8th division of the first ward, the 1st, 2d, 3d, 7th, 8th, 9th, and 10th divisions of the second ward, the 2d, 3d, 6th, and 7th divisions of the third ward, the 6th, 7th, and 8th divisions of the fourth ward, and in the 7th and 8th divisions of the seventh ward, respectively, made false certificates of the number of votes cast at said election, in their respective divisions, for member of Congress, and filed the same in the office of the prothonotary, in the court of common pleas; and that said officers falsely and fraudulently counted and certified divers votes (a particular number being specified in each case) in favor of the sitting member, that had been fairly and legally cast and voted for

the contestant; and to sustain the allegations thus made the contestant gave due notice that he should claim and ask to have a count of the ballots in the several ballot-boxes of the aforesaid divisions and wards.

The committee are of opinion that where the ballots themselves cast at any election are preserved, they will furnish the best evidence of the number of votes which each candidate received. And it seems that the laws of Pennsylvania contemplate that in case the division returns are disputed, the ballots themselves shall finally settle the question.

The law of Pennsylvania on this subject may be found in Purdon's Digest, section 55, page 287, and is as follows:

As soon as the election shall be finished, the *tickets*, list of taxables, one of the lists of voters, the tally papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges, and clerks, shall all be carefully collected and deposited in one or more of the ballot-boxes, and such box or boxes, being closely bound round with tape, shall be sealed by the inspectors and the judge of the election, and, together with the remaining ballot-boxes, shall, within one day thereafter, be delivered, by one of the inspectors, to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents to answer the call of any person or tribunal authorized to try the merits of such election.

The contestant, in pursuance of this statute and of the notice served by him upon the sitting member, caused the ballot-boxes in eleven divisions, hereinafter named, to be opened and the ballots deposited therein to be recounted before the recorder of the city of Philadelphia, and in presence of both parties to this contest, and their counsel, the result of which is exhibited in the following tabular statement:

FIRST WARD.

	Butler.	Lehman.	King.
Eighth division, official vote	160	214	31
Eighth division, recount	156	209	31

Butler's gain, 1 vote.

SECOND WARD.

Second division, official vote	229	134	39
Second division, recount	252	122	26

Butler's gain, 35 votes.

THIRD WARD.

Second division, official vote	112	117	59
Second division, recount	157	92	33

Butler's gain, 70 votes.

Third division, recount agrees with official.
Sixth division, recount agrees with official.

Seventh division, official vote	128	311	22
Seventh division, recount	129	309	20

Butler's gain, 3 votes.

SEVENTH WARD.

Eighth division, official vote	165	238	12
Eighth division, recount	175	228	12

Butler's gain, 20 votes.

FOURTH WARD.

Sixth division, official vote	61	222	5
Sixth division, recount	64	248	6

Butler's gain, 7 votes.

Eighth division, official vote	119	265	41
Eighth division, recount	123	260	40
John Butler	1		
Butler's gain, 10 votes.			
Seventh division, official vote	44	230	5
Seventh division, recount	53	218	7
Butler's gain, 21 votes.			
Ninth division, official vote	176	104	14
Ninth division, recount	176	109	10
Butler's gain, 5 votes.			

RECAPITULATION.

First ward, eighth division; gain for Butler	1
Second ward, second division; gain for Butler	35
Third ward, second division; gain for Butler	70
Third ward, seventh division; gain for Butler	3
Seventh ward, eighth division; gain for Butler	20
Fourth ward, sixth division; gain for Butler	7
Fourth ward, eighth division; gain for Butler	10
Fourth ward, seventh division; gain for Butler	21
Fourth ward, ninth division; gain for Butler	5
Total gain for Butler	172

But the ninth division, fourth ward, is not contained in the specifications of the contestant. The box was opened by mistake for the seventh division, fourth ward; but after counting the ballots the respondent claimed it to be the box of the ninth division, which the contestant admits.

Here is a gain of five votes which justly belongs to the contestant, but as he omitted to specify this division the committee have deducted them, and therefore find the gain for Butler to be 167 votes. The whole plurality for Lehman, on all the division returns, is 132 votes, leaving a clear plurality for John M. Butler (the contestant) of 35 votes.

If this recount of the ballots is to be relied upon, it necessarily follows that the contestant is entitled to his seat.

It is conceded that the recount was correctly made, being done in the presence of both parties to this contest. But the respondent makes two objections to the recount which deserve consideration:

1st. That the ballot-boxes were not sufficiently identified as belonging to the divisions alleged.

2d. That the boxes had been opened and contents changed before the recount took place.

Before considering these objections it should be remarked that they are confined to the ballot-boxes in three divisions only, viz: the 2d division of the third ward, where the recount made a gain for Butler of 70 votes; the 2d division of the second ward, where the gain for Butler was 35 votes; and the 7th division of the fourth ward, where the gain was 21 votes.

1. Are these three boxes sufficiently identified?

The testimony shows that there was much difficulty in determining to what particular divisions the boxes belonged before they were opened, as the boxes generally were without labels or external marks of identification. But it is not essential that the boxes should be identified before being opened. After any box had been opened there was little danger of mistake in determining to what election and to what division it belonged.

In every division they had a large box in which the affidavits of the election officers, a list of voters, taxables, and other papers pertaining to the election, were deposited, and a smaller box in which were deposited the ballots. These boxes were sealed up and carried together to the nearest alderman, and left in his custody.

Upon opening these larger boxes and examining the papers, the particular division would be certainly known, and it would be known also that the accompanying ballot-box for the same division must be found in the same custody; and upon opening one of the smaller boxes, the ballots themselves would indicate in what election they were used. If the names of the contestant and respondent, as candidates for Congress, were found on the tickets, it would be certain that the ballots were cast at the election in question, as those gentlemen were never opposing candidates at any other time.

The number of ballots in the box will generally afford a safe test of the division to which it belongs, by comparing the number with other divisions, with the official returns, number of voters, &c.

In the three disputed boxes under consideration the aggregate number of ballots, as recounted, was, in one box, but *one* less; in another, *two* less; and in the other only *six* less than the official returns; and there were no other divisions with which they would compare as well.

But there is still more conclusive evidence of the identity of the boxes in question.

Two of the boxes were left with Alderman Carter, and the other with Alderman McMullen. The former received, in all, the boxes of three divisions only, viz: 2d division third ward, 2d division second ward, and 3d division of the third ward; and all these boxes were produced and examined. The 3d division of the third ward is admitted to have been identified, the recount agreeing perfectly with the official return. The box of the 2d division, second ward, was marked by one of the judges of election, and by him positively identified.—(See the testimony of Merritt Gibson, printed evidence, page 81.) So that it follows that the remaining box must belong to the 2d division of the third ward.

Alderman McMullen received and produced for examination the boxes of four divisions, which were all he received, viz: 7th division of the fourth ward, (the disputed box,) and the 6th, 8th, and 9th divisions of the fourth ward, and here the three divisions last named are admitted to have been identified; the other box therefore must be the 7th division of the fourth ward.

The committee therefore consider the identification of the boxes complete and satisfactory.

2. The other claim of the respondent is that the boxes had been tampered with before the recount took place.

The contestant produced these boxes from their legal and rightful custodians, sealed up, and in the same apparent condition they were in when left with the alderman. Under these circumstances the burden of proving them to have been tampered with properly rests on the respondent; but no proof upon this point was submitted, except some testimony showing that some of the boxes were left in such a situation that it was *possible* for some unauthorized person to have meddled with them.

But there is no proof to render it *probable* that such was the case.

The respondent attempts to rebut the evidence afforded by the recount of the ballots, by calling the election officers who made the division returns to testify that *those returns were correct;* but in the opinion of the committee this testimony neither impairs the case of the contestant nor strengthens that of the respondent.

Officers who had declared upon their official oaths that returns made by them were true, would not be likely to come into court afterwards and swear that they were false.

The committee have not deemed it necessary to determine whether the errors in the division returns, before mentioned, were the result of deliberate fraud or mistake on the part of the election officers, for the motive which actuated them is immaterial. It is enough that the returns in the divisions specified were *false in fact*, and that the contestant was thereby deprived of votes fairly and legally cast for him, enough to have elected him; of this the committee are fully convinced. They consider the case of the contestant clearly proved, and that he is entitled to the seat now occupied by William E. Lehman, and therefore they submit the following resolutions, and recommend that the same be adopted by this house:

Resolved, That William E. Lehman is not entitled to a seat in the 37th Congress, as the representative from the first congressional district in the State of Pennsylvania.

Resolved, That John M. Butler is entitled to a seat in the 37th Congress, as the representative from the first congressional district in the State of Pennsylvania.

The minority of the committee in their report argue as follows:

It is well settled that the primary returns of votes made under State authority, such as these *division returns*, are prima facie evidence of their legality, of the number of votes cast, and the rights of the respective candidates.—(See Spaulding *vs.* Mead, Cong. Con. Elec., p. 159; Bassett *vs.* Bailey, Cong. Con. Elec., p. 254; Read *vs.* Kneass, 2 Parsons, selected cases, p. 573.)

The inquiry now presents itself whether the testimony of the contestant is sufficient to overcome the legal effect of these division returns and the other testimony of the sitting member. In order to determine this question satisfactorily, the undersigned regard it sufficient to review that portion of the testimony taken by the parties, relating to the recount of the contents of the ballot-boxes, claimed by the contestant to have been used in *three* only of the election divisions—those of the 2*d division* of the 2*d ward*, the 2*d division* of the 3*d ward*, and the 7*th division* of the 4*th ward*.

The ballot-box of the division last mentioned was found in the possession of Alderman *McMullen*, and those of the other two divisions in that of Alderman *Carter;* these aldermen being the magistrates nearest the place of holding the election.

The testimony of the election officers in these three divisions was taken by the sitting member, showing the manner in which the election was conducted, the votes counted, tallied, and certified; but no testimony in respect to the like matters was taken by either party in respect to the election in any other district.

The gain claimed in the 7th division of 4th ward is	21
The gain claimed in the 2d division of 2d ward is	35
The gain claimed in the 2d division of 3d ward is	70
Making the gains in these three divisions	126
The gain claimed in the other eight divisions is	46
Making the aggregate gains claimed, as above stated	172

If the 46 votes above mentioned should be allowed the contestant, it would still require 87 of the remaining 126 to elect him; so that if the 70 votes above specified as gained in the 2d division of the 3d ward, or those gained in the 2d division of the 2d ward and the 7th division of the 4th ward, should be rejected, in either case the sitting member would still have the majority.

In order to command confidence in the recount of any of these ballots, it is necessary for the contestant, first, to establish the *identity* of the ballot-boxes; and, secondly, to show that *those boxes had been so kept* as to rebut any reasonable presumption that they had been tampered with. The testimony of the contestant was mainly directed to these two points; but there was much difficulty *in each case*, with one or two exceptions, in establishing this identity.

These boxes are provided by the city officers; and those used in the different election districts are described by the witnesses as being of the same size and color, had been used at many previous elections, tied round with tape in the same way, and sealed by dropping upon the tape melted sealingwax, ordinarily without an impression of a seal of any kind, or without labels or other indicia to denote when or in what election districts they had been before used. Twenty or more of these boxes were found with the several aldermen called on to produce them.

These boxes had been used at the several fall and spring elections in the years 1859 and 1860; those used at different elections being indiscriminately mixed together, and apparently kept in places to suit the convenience of the alderman and his family, rather than in such as were adapted to the safe-keeping of their contents.

The testimony of Alderman McMullen well illustrates the difficulty under which the witnesses labored in their efforts to identify these boxes. Those of four divisions of the fourth ward appear to have been left with this witness, though at first he seems to have been confident he had those of only three, belonging to the 6th, 7th, and 8th divisions, but after some days he supposed, from its *contents*, that he had discovered that of the 9th. He was first called on to produce the box containing the election *documents* of the *8th division*, made at the October election. He first produced a box with the label of that division upon it, which, upon being opened, was found to contain the election documents of the *presidential election*, held in November. In the same manner, while in pursuit of the box in question, three other boxes, produced by this witness, were opened before the one sought for was identified, and then identified only by its contents. The election officers, whose testimony, as to the question of identity, would have been the best in the case, were not called at all by the contestant; and afterwards, when called by the sitting member to testify to other matters, were unable, except in a single instance, to identify these boxes, and, in respect to each box opened, they testified that, *if the boxes were the same*, the votes taken from them on the recount were not those put in them by the officers on the night of the election. The *most satisfactory* evidence as to this point of identity was the result of the recount. If it coincided with the official return of the judges and tally-list, as was the fact in *two cases*, the proof on this point was sufficiently conclusive. If the difference between the recount and the return were small, as it was in most cases, varying from one to ten, the proof of identity from the contents would be *less conclusive;* but conceding the identity of the box, and also that the difference referred to was occasioned by the election officers, its smallness, in the judgment of the undersigned, would be much stronger evidence of mistake on their part than of the criminal fraud with which they are charged.

In cases in which the disparity between the recount and the return was very considerable, the evidence of identity from the contents was far less strong, and the presumption upon this point becomes slight in proportion to the increase of this disparity. In instances in which this disparity was very large, (if admitted that it was occasioned by the election officers,) it would, unexplained, afford *stronger* presumption of fraud; but should this presumption be rebutted by satisfactory proof, it would then furnish *still stronger* evidence that the boxes had been tampered with, it being at the same time shown that what the law denominates *means* and *opportunity* existed for such tampering.

So far as facility of access to these boxes is concerned, they were much in the condition, as appears from the above testimony, they would have been if kept similarly exposed in the office of a country magistrate, or in a county court-room, though the latter may not be "*always open*" like the offices of these aldermen.

If they were not tampered with during the long interval they were so kept, it was not for the lack of the *means* and *opportunity*. That the *motive* for such tampering existed among some portion of the people in that community would hardly be denied by the contestant, in view of the very grave charges of fraud he has made against so many of its public officers. This tampering might as well have been done by the hand of one person as more.

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"It is a *presumptio juris*, running through the whole law, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, whether *malum in se* or *malum prohibitum*. And this presumption is not limited to proceedings instituted with the view of punishing the supposed offence, but holds in all civil and other proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally."—(Best's Presumptive Evidence, p. 56.)

It seems, then, as we understand the law, that the contestant might be justly and properly held to prove the truth of his charges against the election officers, not merely by the *weight of evidence*, as in civil cases, but beyond a reasonable doubt. The only testimony, as we have seen, that tends to establish their guilt is the recount of the ballots. Taking into view the difficulty of identifying the boxes, the manner in which they were kept, the time that had elapsed before they were opened, had those officers been on trial under an indictment for the offence, with no other testimony against them, it is a matter of grave doubt if this evidence, standing unsupported as it does, would have been sufficient to have put them upon their defence. The testimony is circumstantial, and only *one circumstance*, unsupported in any way. It may be well questioned whether this circumstance, standing as it does alone, can justly be regarded as affording evidence of higher nature than what is technically known as "*a slight presumption of guilt*," which, it is said, "may excite *suspicion*, but is not *proof*; nor does it *change the burden of proof*." In order to a successful prosecution of those persons in the case supposed, the testimony against them should not only be such as to *counterrail* the *presumption of innocence*, which the law itself *makes evidence* for the accused in all prosecutions for crime, but also the still stronger presumption with which it fortifies and guards the official doings of its own officers. It is not enough, in such cases, that the testimony tends even strongly to establish the guilt of the accused, but that guilt must be shown to be inconsistent with any reasonable supposition of innocence.

In this connexion we invite attention to some matters and incidents that are disclosed in this case, *negatively* as well as *affirmatively*, and to some other inferences deducible from the facts proved.

There is no testimony tending to show that any prejudice, interest, or other motive existed on the part of these election officers that should induce them to injure either of the parties to this contest.

The result of the election at each poll was publicly announced on the night of the election. Nothing appears in the case to show that this result, as *then* announced, was not at the time acquiesced in by the candidates, voters, and all interested; nor is there any intimation of any contemporaneous rumor or suspicion of fraud.

The contestant's theory of his right to a seat from the recount of the ballots is predicated on the hypothesis that the judges of election returned to the ballot-box the *same number of votes* in the *aggregate*, and the *same number for each candidate* cast by the voters, and that these *identical* votes, no more nor less, were found in the ballot-boxes on the recount. Yet it will be found, on comparison, that the aggregate number of votes *taken* from these three boxes, severally, on the recount was less than the aggregate number in the official return or tally-list. How has this disparity been occasioned? Has it the hue of fraud in the judges or of tampering with the boxes?

Again: it will be apparent that the contestant can be entitled to the votes found in his favor upon the recount only upon the hypothesis that the judges *returned* to the boxes the *same votes* taken out of them. This hypothesis involves the additional assumption that these fifteen election officers, while in the act of perpetrating their crime, knowingly *sealed* up and *preserved* for the use of the prosecuting officers the best and only evidence that could convict them. What police justice ever found so strange and grotesque a combination of knavery, folly, and stupidity united in the same culprits?

There is nothing to indicate that the contestant himself supposed that he had reason to suspect these election officers till after the governor refused to issue a proclamation in his favor so as to enable him to avail himself of the fraud of Byerly, nor that he had reason to believe that proof of fraud would be revealed by unsealing the ballot-boxes till more than eight weeks after the votes had been returned to them. Nor does it appear at what time or in what way the revelation was made to him that this *eighteen* upon which this tower of Siloam fell were any more worthy of condemnation than the residue of the ballot-boxes in the city of Philadelphia.

* * * * * *

This case, as it now stands before the committee and the House, in some of its important features, is of a *new type*, and, as the undersigned believe, without precedent in contested elections in Congress or elsewhere The ballot-boxes opened in behalf of the contestant, as we have seen, were provided, used, and kept under the statute law of Pennsylvania, and to be so kept, in the language of the law, "to answer the call of any person or tribunal authorized to try the validity of the election." In *that State*, to obtain an order of that sort it is necessary to make application to the court for it, and the application must be supported by such sworn testimony as will satisfy the court that the granting of the order would promote the ends of justice. In that State we find several reported decisions referred to in which an order for this purpose was applied for and denied, but *none* in which it has been granted. In the present case these boxes were opened, against the protest of the sitting member, by the order of the magistrate who took the testimony, and upon the demand of the contestant, without an order of any court or of this house or its committee, and without any proof, by oath or otherwise, that these boxes contained testimony pertinent to the issues in the case. In our judgment the magistrate was not a *person* nor a *tribunal* authorized to try the merits of this election, and had no authority under the law of Pennsylvania or of Congress to order those boxes to be broken open.

In the opinion of the undersigned, the objection of the sitting member to the opening of these boxes was well taken; and if that objection had not been waived at the hearing, the testimony as to the recount should have been overruled. If a practice of this sort should be sanctioned, as it will be if this case should be made a precedent, the Committee of Elections of this house, in the future, will have no occasion to be idle for the want of a docket.

What candidate for Congress in the future, whether *counted out* by the judges of election by a majority of one hundred and thirty-two or *more* or *less* than that number, would be so destitute of public enterprise as not to claim a second trial before "a mayor or recorder of any city or town in the United States," or a constabulary court of two justices of the peace, with a profert and rummage of the ballot-boxes, especially when it could be done without putting his purse in jeopardy by giving bail for cost, or filing his conscience by the cheap and easy *ex parte* oath of a litigant in court? And to what extent may we not expect to see efforts and enterprises of this sort quickened into life and intensified in earnestness when we consider that the guerdon of success, on the one hand, is a seat in this house, and that the pain and disappointment of defeat, on the

other, are soothed and mitigated, if not, in fact, wholly cured, by *pro rata* pay and congressional mileage?

The views of the undersigned in respect to this appeal to the reopening of the ballot-boxes, and of the mischiefs, abuses, and evil consequences to which it must lead, unless restrained by stringent and well-understood rules and safeguards, are so well expressed in the opinion of the court in the case of Kneass *vs.* Reed, upon a motion for opening the boxes for a recount, that we take the liberty to quote briefly from that decision:

The authority given us by law (say the court) is to inquire into the undue election and false returns of certain election officers. The returns of such election, made by the officers charged by law with conducting them, are to be received as true till the contrary is shown. Every fair presumption is to be made in their favor. These are fundamental principles, applicable to all sworn officers. Is it too much to require of a party who seeks to assail such returns a precise statement, authenticated by oath, of the grounds of fact upon which he impeaches the doings of hundreds of sworn officers? * * * * Ought not he who desires to search into a ballot-box to give other reasons therefor than his mere wish to do so, in the hope of finding something that may inure to his own advantage? Surely the answers to these propositions must present themselves to a calm and unbiased mind the moment they are stated. And must not the answers be, that the sworn returns are the official expression of the doings of each and every election poll, and that the contents of every ballot-box must be presumed to be truly expressed by the returns thereof?

* * * * * * *

The long period which must necessarily elapse between the holding the election and the arrival of the time for contesting its results would afford a terrible opportunity to deal with the thousand of ballot-boxes scattered over the State. * * * No more ingenious way could be devised to invite fraud than such looseness of procedure; and once established, a flood of evil would inevitably rush in, which those having the most acute foresight could hardly estimate the amount of. All this to some extent could be avoided by simply requiring that he who desires to scrutinize the contents of the ballot-boxes should first say, on oath, what he expects to find in each of them incompatible with the returns predicated upon them.

Whether in the face of the foregoing facts, considerations, and suggestions, *apart from the direct testimony of the sworn witnesses*, the contestant may be regarded as having established his claim to a seat in this house, either by the *weight* of *evidence* or *beyond* a *reasonable doubt*, the exigencies of the case do not require the undersigned or the House to determine. But when to the foregoing attending circumstances and incidents of the case, such as appear negatively as well as positively, there is added to the same scale the direct, explicit, and uncontradicted testimony of the election officers, the undersigned cannot doubt or hesitate in respect to the conclusion to which they should come.

It has been the aim of the undersigned to investigate, collate, and present the facts and testimony in this case in such way as they might be readily understood and appreciated, and so as to serve the ends of right and justice between the parties most immediately interested; and in the discharge of this duty they have come to the unhesitating conclusion that the testimony submitted by the parties to the Committee of Elections does not show that the contestant is entitled to a seat in this house; but that it does show that the sitting member is entitled to retain the seat heretofore awarded to him. In accordance with the foregoing conclusions, the undersigned submit the following resolutions:

Resolved, That John M. Butler is not entitled to a seat in this house.
Resolved, That William E. Lehman is entitled to a seat in this house.

SAM'L T. WORCESTER.
J. W. MENZIES.
G. H. BROWNE.

The following are extracts from the debate in the House:

Mr. WORCESTER. * * * * * The contestant, it will be seen, claims a seat in this house by undertaking to show that the election officers in these ten election divisions have been guilty of a violation of law; and in order to substantiate this right, and make out his case in accordance with the ordinary rules of evidence, it is necessary for him to prove his charges, not merely by the weight of testimony as in civil cases, but establish them, as in criminal prosecutions, beyond a reasonable doubt. And to show that such is the law, I refer *to page 56 of* Best's Presumptive Evidence:

"It is a *presumptio juris*, running through the whole law, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law, whether *malum in se* or *malum prohibitum*. And this presumption is not limited to proceedings instituted with the view of punishing the supposed offence, but holds in all civil and other proceedings for whatever purpose originated, and whether the guilt of the party comes in question directly or collaterally."

But the sitting member does not claim, and the minority of the committee do not insist upon, the benefit of any technicalities of this sort. So far as the rights of the parties are concerned, the minority of the committee are disposed to have the matter submitted to the House on the weight of the testimony. The only evidence that has been introduced by the contestant is the recount of the votes in the ballot-boxes; and it has been well said, that in order to give confidence to that recount, and to justify the majority of the committee in their report in favor of the contestant, in was necessary that, in the first place, these boxes should be identified. This appeared to be a matter of very considerable difficulty on the part of the contestant. These boxes had no marks upon them, no indications to show when they were used, or at what election precincts. They were all of the same size and color, and had, as appears from the testimony, evidence of having been often used. When witnesses were called upon for the purpose of identifying them, and determining at what particular division they had been used, they were in many instances wholly unable to do so. Alderman McMullen, one of the witnesses who was first called upon, was requested to produce a box which belonged to the seventh division of the fourth ward. He produced a box which he said he believed to have belonged to that division. On opening it, it was found to have been used at the presidential instead of the State election. And so he went on from box to box, guessing at the right one, till he opened four before he found the one he was in search of. This, gentlemen, is but a fair example of the persistent efforts made to discover these boxes. The principal evidence which is claimed as showing their identity is that which results from their contents. If the contents agreed with the official return as made by the election officers, their identity was regarded as established. If it came near it, it was regarded as good proof of identity, yet not absolutely conclusive. If the discrepancy was very considerable, it was a proof against identity, and the identity had to be established in some other way. It seems to me that the fact of the difference being small is very unsatisfactory evidence of identity, and that where the difference was large, the box being identified, it was either evidence of fraud on the part of the election officers or of some one else; and then the question to determine would be whether it was the fraud of the election officers or some one else.

Mr. HARRISON. I desire to ask my colleague a question. I have not had an opportunity of examining the testimony in this case, and therefore I would inquire of him whether there was any evidence before the Committee of Elections tending to explain why three months elapsed from the time the ballot-boxes were placed in the possession of the aldermen before the recount took place?

Mr. WORCESTER. There is no explanation in the testimony upon that point. The testimony shows that the boxes remained in the same custody, or rather, I should say, in the possession or on the premises, of the men by whom they were taken immediately after the election.

Mr. DAWES. Perhaps my colleague upon the committee has overlooked this fact, that the election was held on the second Tuesday in October, and that up to, I believe, the 9th day of November, the contestant was declared the sitting member, and of course had no occasion to move in the matter. On the 9th day of November, the governor, by his proclamation, very properly, as I think, declared that the sitting member was entitled to the certificate.

The law requires that the man who contests with him who holds the certificate shall file his allegation in a given time. He has thirty days to do it in. The respondent then has thirty days to file his answer, before testimony can be taken. That length of time did not elapse, however, because these parties did not avail themselves of all the time allowed; but a whole month elapsed before any certificate was granted to anybody, before either of them knew which of them was to file the allegation. On the 6th of December, which was another month, the last of the specifications was filed by the contestant. To that the sitting member responded without any unreasonable delay. But two months elapsed, necessarily, before the pleadings were in such a shape as to call upon the sitting member for his final answer. He had some time—I do not remember exactly how much time—to file his answer, and then it was, in the early part of January, that they commenced the taking of testimony. Perhaps that is some explanation.

Mr. WORCESTER. My recollection is, that the original specifications were filed on the 9th of November, and in those specifications there was no notice of any intention on the part of the contestant to resort to these ballot-boxes. Afterwards, on the 6th day of December, additional specifications were filed, and appended to those specifications was a notice given to the sitting member that the contestant would resort to the ballot-boxes for a recount, but there is nothing in the testimony before the committee which goes to show that any steps or measures were taken to add security in any way to the ballot-boxes or their contents.

Mr. DAWES. Perhaps my friend can state to the House what it was that the contestant could do to add to the security of ballot-boxes which were in the custody of the law and [illegible] within his reach.

Mr. WORCESTER. I suppose there are means of preserving and perpetuating testimony in the State of Pennsylvania. I believe there are in most of our States, and I hope the laws of Pennsylvania are not defective on that point.

Mr. DAWES. There are no means in the State of Pennsylvania for preserving testimony in contested election cases before this house, except those prescribed by an act of Congress, and that act I have stated.

Mr. WORCESTER. I cannot answer the gentleman on that point. As I have said, this is the first case of the kind that has occurred here. I know of no other like it in the history of contested elections. I believe it to be without precedent, and it is for the House now to determine, by its action in the case, what practice is to be inaugurated in respect to cases of this character. If a party who is defeated in a contest at the ballot-box for a seat upon this floor can, without any showing at all, without giving security in any manner, upon his own mere motion, go to the magistrates, or to the trustees of a township, or to the aldermen of a city, and claim from them, by giving notice of contest, that the ballot-boxes shall be reopened and the ballots recounted, it is time that this house knew that such is the state of the law. As I said, the case is without precedent; and I will say, further, that in the State of Pennsylvania, under whose laws these ballot-boxes are provided and kept, though there are quite a number of precedents reported in their books where parties have attempted to resort to the ballot-boxes for a recount, in every reported case the motion has been denied by their courts. Such a motion, when made before their courts, has been made upon the oath of the party, that the ballot-boxes contain evidence that would be pertinent to the issue to be tried. And not only that, sir, but it is necessary, under their laws, that that notice shall be given within a very short time after the election takes place, and relief can be granted in such cases only upon a showing under oath and upon the order of the court. In this case it was done by the act of the party himself; and if this case is to be drawn into a precedent, then I may well ask which of us is safe in our seats here? There is not a member of this house in whose case the ballot-boxes may not be opened and a recount demanded, under similar circumstances.

Mr. RIDDLE. Mr. Speaker, feeling constrained to differ from the conclusion at which the majority of the committee have arrived, without any purpose whatever to detain the House by any extended remarks, I beg leave to refer to one or two of the principal points in this case.

By the action of the House at the extra session, as it is called, the sitting member acquires what lawyers call a *prima facie* right to his seat. That is opposed by the contestant by what he says is proof that overcomes it, and settles the merits of the controversy. That proof consists entirely and exclusively in a recount of the ballots which he says were cast at that election. Now, everything depends completely and entirely on the fact on which this proof can alone be predicated—the identity of the ballots counted with those that were cast at that election. If there is a failure in the proof to establish that identity, then the proof necessarily fails, and, so far as it is made to depend on them, it leaves the case entirely uncompromised.

Now, I do not propose to examine the question of legal custody. I do not propose to say a word about the proof of the identity of these ballots, except as to that which is drawn from a single and most peculiar source. On page 6 of the majority report you find just exactly the kind of proof of identity on which the committee predicated their report in favor of the contestant. It is this:

"The testimony shows that there was much difficulty in determining to what particular divisions the boxes belonged before they were opened, as the boxes generally were without labels or external marks of identification; but it is not essential that the boxes should be identified before being opened. After any box had been opened, there was little danger of mistake in determining to what election and to what division it belonged. * * *

"If the names of the contestant and respondent, as candidates for Congress, were found on the tickets, it would be certain that the ballots were cast at the election in question, as those gentlemen were never opposing candidates at any other time."

Now, sir, this case is met with a proposition to give in evidence the contents of certain papers. What is the first question? You must not only establish the identity of the papers, but you must also establish their *execution*. How do you establish the identity of the papers? It is sought to be done here by showing the custody from which they were taken. How establish that? The committee themselves say that these papers—the ballots that have been used—can be witnesses in the case to establish the identity.

Mr. DAWES. The paper that the committee speak of as one of the papers sealed up in a particular box is the oath taken by three men as judges, to which paper their names are attached, and the certificate of the magistrate. Three men bearing those names were judges in a particular district. There are no such names of men as judges in any other district. The law requires that the boxes shall be sealed up, with the certificate of their qualification in it. Now, I wish to know from my friend what more is necessary, when you open a box containing that certificate and these names, to trace it right to that division? That is the identity.

Mr. RIDDLE. It so happens, Mr. Speaker, that the ballots are not laid in the box with the *certificate, but* are in a box by themselves. I know that they are found within the same box,

but they are just as effectually cut off from each other as if they were a thousand miles apart. Does the gentleman claim to identify these ballots by the other papers to which he refers? These papers contradict his ballots.

Mr. DAWES. I do not see the gentleman's point, or he does not see mine. I understood him to say, which induced me to rise, that the papers that were found were no evidence, for the reason that we did not prove their execution. There is no such thing as proving the execution of a ballot. The papers found in one of the two boxes have the names, in their own handwriting, of the men who acted as judges in a particular precinct; and when you open the box and find in it the paper with these names, I do not doubt that the box belongs to the division where these men were judges.

Mr. RIDDLE. I was unquestionably very unfortunate in the expression that I used. I did not say a word about this certificate or any of the accompanying papers. With them I have nothing to do. I was speaking of the ballots alone that are shown by the proof to have been contained in a box exclusively by themselves.

Mr. DAWES. Now will my friend tell us what he means by proving the execution of ballots?

Mr. RIDDLE. Certainly I will. I was remarking on the general proposition that a paper offered for proof is, first, not only to be identified, but proof of the execution is to be given. In the instance of a ballot, the same proof that identifies it does prove its execution. So that it comes back here to a question of identity. Before it can be used at all for the purpose of evidence its identity must be established. You established it, the gentleman says, by establishing the identity of the place where it is found. How do you establish that identity? By the contents of the paper itself? Why, by the rules of evidence, the paper can utter no story for any purpose. Before you can read the paper at all you must settle the question of identity. And yet the committee read the paper, and the paper alone, to establish that identity. Am I understood here? If so, sir, there is not one shadow of proof that amounts to that grade of certainty which the judicial or legal mind tolerates as proper, on which to predicate any conclusion, however slight in its gravity, to sustain the identity of these ballot-boxes. But here they refer to these ballots to establish their own identity before the identity of the boxes is established.

Then, sir, meeting this question at the very threshold, I say there is no proof on which any recount can be predicated, because they have failed to establish the identity of the ballots cast with the ballots found. It could not be done, because the proof on which gentlemen rely they are estopped from using.

Mr. CAMPBELL. * * *. Now, this act of the legislature ordering a recount in cases of a contested election means something, or it means nothing. If it is a dead letter upon the statute-book, then it amounts to nothing. But it is a vital statute, and was intended to meet a case like this, where from alleged fraud or mistake it cannot be determined who received the highest number of votes without resorting to a recount. In just such a case as this our courts of law would order a recount of the ballots, and then take such action as they saw proper, or submit the whole case fairly to a jury, as in this case the evidence is submitted to the House of Representatives.

Now, sir, we come to the point—and it is the only point in the case—were the boxes opened after they were sealed up by the election officers and before they were reopened by the commissioner who took the testimony? To hold that they have been opened after they were sealed up, in the face of certain facts I will demonstrate, is perfectly preposterous. In the first place, to have reopened those eleven boxes, and deposited fraudulent ballots in them, would have involved the fraud of some five aldermen, with whom different boxes had been deposited, and the fraud of the parties who were aiding and abetting in depositing the additional votes. More than that, it involves the fact that you could not detect where any one of those eleven boxes had been opened, from any change of tape, or any change of or injury to the seals. But it goes still further than that, and becomes perfectly ridiculous. Tell me, would men contemplating a fraud upon the elective franchise to the extent of 130 votes deposit in one box only one vote out of the 130, as occurred in one case out of the eleven; or, as in another case, would they get five aldermen, and other parties to the fraud, to break the seals and tape, to put in a ballot-box *three* additional ballots out of 130? I hold it is a monstrous supposition. Parties to a fraud like that would have deposited a certain number of ballots, enough to change the result in one, two, or three of those boxes. They would have taken into their confidence one or two aldermen, not eleven, nor five, besides sundry other parties, to join with them in putting into one box a single vote, in another three, in another five, and in another seven.

Sir, I reject this hypothesis. I look to the more rational explanation; and that is, that these election officers, on the night of the election, in their haste, and in the manner in which they counted the votes, committed these errors by mistake, and not by fraud. I do not suppose that all, or, it may be, that any of these election officers were guilty of fraud [illegible] votes for the contestant which belonged to the sitting member, and *vice versa*. [illegible] they counted them in haste on the night of the election; and that in counting [illegible] tens, in violation of law, and not singly, they committed the mistake [illegible] two in another, seven in another, and so on to the highest number re[illegible] Why, they were not counting the votes as the law of Pennsylva[illegible]

counting them in violation of law, for, instead of taking up each ballot separately and calling out the name and directing the clerks to mark it down for the candidate for whom it was cast, they selected them by tens and counted them by tens. I hold that the whole case goes to show that there was a mistake. I am charitable enough to suppose that it was so, and this is the mildest form in which I can place it for the officers. I insist that the case comes before the House without any proof that the ballots had been tampered with. And it appears that it has not been attempted to prove a fraud so extensive as to embrace five aldermen in different divisions or wards, of different characters and dispositions, and of different political associations and views, and all for the paltry purpose of adding an additional vote or two to a ballot-box. The whole weight of evidence in this case is on the side of the contestant.

Mr. THOMAS, of Massachusetts. I wish to know of the gentleman from Pennsylvania what the law of Pennsylvania is in relation to the opening of these boxes?

Mr. CAMPBELL. The law in reference to opening ballot-boxes in cases of contested elections is this—that the court will, upon the allegation of either party based upon fraud or mistake, supported by affidavit, in the exercise of a sound discretion, order the boxes to be brought into court and a recount to be had. That was done by the commissioners in this case. Now, Mr. Speaker, I understand that these boxes were opened under the order of the commissioner, taking testimony in the presence of both the parties. It is enough for me to get at the truth of the case; I care but little about its technicalities.

But it is asked what evidence there is to show that the original ballots and papers were deposited in these boxes by the election officers. I reply, that it is made the sworn duty of these officers to do that very thing: and there is no evidence to show that they did not do it. The law presumes that an officer discharges his duty; and in the absence of proof to show that he did not discharge it, the presumption of law is conclusive that he faithfully complied with the law. It was their sworn duty to make the deposit, and I suppose they did it, of course, in the absence of proof to the contrary.

But the gentleman from Ohio [Mr. Riddle] said there is no proof of the identity of the papers—the tally lists, the list of voters, &c.—contained in these boxes. Mr. Speaker, they were opened in the presence of the parties themselves, and of the judges of election and the witnesses, before that commissioner; and I have looked in vain through the reports of the majority and of the minority to find that any such point was made before the committee, or that either party required proof of the identity of the signatures to the papers contained in these boxes before the commissioner. The point raised by the legal acumen of the gentleman was not made a point in the case, and does not seem to be relied upon by either of the parties: and I hold that it was unnecessary to furnish proof of the identity of the handwriting, unless the parties required it, or objection was made.

The House adopted the resolutions reported *by the minority*, declaring Mr Lehman, the sitting member, entitled to a seat—Yeas 77, nays 67.

NOTE.—Speeches in the House, for and against the majority report, will be found in vol. 46 Congressional Globe For the report: Mr. Loomis, page 365; Mr. Campbell, page 373. Against the report: Mr. Worcester, page 368; Mr. Menzies, page 374.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

CLEMENTS, *of Tennessee.*

Tennessee being in rebellion against the general government, an election was ordered to choose delegates to the rebel Congress, the day fixed being the one named in the constitution and laws of the State for the election of representatives to the Congress of the United States. The loyal voters of the fourth district cast their votes for Mr. Clements to represent them in the Congress of the United States. The election was held to be valid.

The refusal of a governor to grant a certificate does not prejudice the right of the claimant to a seat.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 13, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

That they have had the matter of said memorial under consideration, and find the following facts: By the constitution and laws of Tennessee, the time fixed for the election of representatives to the present Congress was the first Thursday

of August last. Previous to that date, viz: in May last, the legislature of Tennessee, in special session, sought, by the adoption of an ordinance or declaration of independence, to declare the State independent of the United States. The State, also, in the same month, by commissioners appointed for that purpose, formed a league, offensive and defensive, with the southern confederacy. This transaction, together with an ordinance for the adoption of the constitution of the provisional government of the Confederate States, was submitted to the people for their ratification on the 8th day of June last. In this ordinance it was also enacted that if said constitution should be adopted by the people, it should then be the duty of the governor forthwith to issue writs of election for delegates to represent the State of Tennessee in said provisional government, of whom they were to have the same number, to be elected from the same districts, as they were entitled to representatives in this Congress. The governor of the State, on the 24th of June, by proclamation, declared that these proceedings had been ratified "by an overwhelming majority." He thereupon issued another proclamation, ordering an election of delegates to the provisional congress of the confederacy on the first Thursday in August, the day fixed in the constitution and laws of the State for the election of representatives to the Congress of the United States.

The Union electors in four of the ten congressional districts, regarding these proceedings as without warrant in the constitution, and plainly in violation of its most positive injunctions, and therefore entirely void, heroically disregarding them all, cast their votes upon that day for representatives to the Congress of the United States, in conformity with the requirements of the constitution and laws of Tennessee. The number of voters who thus resisted rebellion, and discharged their duty as citizens in these several districts, cannot be exactly determined, for the law requires the sheriffs of the several counties to certify those votes to the governor, and him to make proclamation of the result. Such sheriffs as were disloyal refused to make the certificates required by law, and all that were made were suppressed by the governor, himself actively engaged in the attempt to overthrow the government. But there exists no doubt that a very large vote was cast in several of these districts for representatives to this Congress, in the face of the governor's proclamation and of a fierce and bitter spirit of denunciation and threatened violence. Too great praise cannot be awarded to the fearless voters who braved this tempest. But two gentlemen, however, have appeared here, claiming to have been chosen at that election—the honorable Horace Maynard, as the representative from the second district, for whom it is believed that nearly ten thousand votes were cast, and who now occupies a seat upon this floor by virtue of said election, and the memorialist, who claims to have been elected at the same time in the fourth district. He brings no certificate from the governor of Tennessee; but the refusal of the governor of Tennessee to grant a certificate of election to one entitled to it cannot prejudice his right to it.—(Richards's case, Hall & Clark, 95.) It may and has put him to the trouble of substantiating the fact of his election by other evidence before he can take his seat. The memorialist has presented the proper certificate of the sheriff of one county (Macon county) that he received in that county four hundred and thirty-three votes. The sheriffs of the other counties in the district failed or refused to make returns of the votes cast for him in their respective counties, being themselves either open rebels or in sympathy with the rebellion. But the statutes of Tennessee themselves, as well as the precedents of Congress, have provided for this emergency by enacting that "if the judges fail to return the poll-books or list of votes, or copies of them certified as aforesaid, the same may be proved by other creditable testimony, and received as evidence in any case arising out of said election."—(Code of Tenn., sec. 870.) In accordance with this provision, the memorialist presented evidence before the committee to satisfy them that he had received, in addition to the four hundred

and thirty-three returned by the sheriff of Macon county, votes in each of the other counties comprising the district, except Warren, amounting in the aggregate to more than fifteen hundred votes; making in all about two thousand votes. The proof of this has been exceedingly difficult, because of the fact that the indignation of the secessionists against the memorialist for permitting himself to be a candidate rose to such a pitch immediately after the election that he was obliged to flee from the State to escape assassination, and has not been able to return to it since. But he has furnished from the volunteers, now in the service of their country in Kentucky, who were his constituents and voted for him in Tennessee before leaving their State for the war, and from other testimony, evidence which has satisfied the committee of the fact. The committee are also satisfied that on the day of election there was an armed rebel force present in the district preventing or restraining the voters from the exercise of the elective franchise, and that though a violent and bitter public sentiment existed, calculated to overawe and intimidate, yet the rebel forces had not, up to that time, so taken possession of the district as to prevent such voters as chose so to do to deposit their votes for a representative in this Congress. The ordinary vote of the district is about six thousand; and then there were at the same time two candidates running for the confederate congress, but no other candidate except the memorialist for the Congress of the United States.

In conclusion, the committee, upon the whole evidence, find that on the day of election no armed force prevented any considerable number of voters in any part of the district from going to the polls, and that on that day, in conformity with the forms of law, two thousand votes at least were cast for the memorialist as a representative to this Congress, and none, so far as the committee know, for any other person. They therefore report the following resolution, and recommend its adoption:

Resolved, That Andrew J. Clements is entitled to a seat in this house as a representative in the thirty-seventh Congress from the fourth district in Tennessee.

The House agreed to the resolution without debate.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

CHARLES H. UPTON, *of Virginia.*

The election laws of the State of Virginia not having been complied with—the incumbent not producing satisfactory evidence that *any* votes were legally cast for him, the committee held that the election was not valid.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 30, 1862.

Mr. WORCESTER, from the Committee of Elections, made the following report:

That they have had the claim of the said Upton to a seat in this house as a representative from the district aforesaid under consideration; that they have examined the testimony taken in the case, and considered the legal propositions and arguments submitted to them in support of said claim.

It will be seen that the resolution of the House referred to the Committee of Elections involves the determination of two questions: first, that of the *eligibility* of the incumbent; and, secondly, if *eligible*, whether the conditions and circumstances attending his election were such as to entitle him to retain his seat.

The Constitution of the United States requires that a representative in Congress shall, when elected, be an *inhabitant* of the State in which he is chosen. The only question made or doubt suggested in respect to the *eligibility* of the

incumbent was, whether on the 23d day of May last, the day heretofore fixed by law for the congressional election in Virginia, he was an inhabitant of that State.

It appears from the facts admitted in the case, and the testimony submitted to the committee, that the incumbent for the last twenty-five years has been a freeholder in the State of Virginia, having himself for the most of that time been a resident and *inhabitant* of the county of Fairfax, where he and his family were domiciled. For some time prior to the month of November, 1860, the incumbent himself had lived at Zanesville, in the State of Ohio, where he owned an interest in and had been engaged in conducting a daily newspaper, and it was shown that he voted at that place at the annual State election in October, and again at the presidential election in November of the same year. Under the law of Ohio in force at that time, the legal right to vote at either of those elections would necessarily imply a previous residence in that State of one year at least. But the evidence adduced upon this point satisfied the committee that in the month of November, soon after the presidential election, he returned to his previous residence in the county of Fairfax, where his family had remained and then was. From that time to the month of June last he continued to be a resident and *inhabitant* of the State of Virginia, and consequently not *ineligible*, on account of the objection in question, as a candidate for Congress from that State at the date above referred to.

The seventh congressional district of Virginia comprises the counties of Alexandria, Spotsylvania, Fairfax, Fauquier, Prince William, Rappahannock, Culpeper, Stafford, Orange, and King George, situate in the northeastern part of the State. The examination into the *regularity* of the election of the incumbent, with which the committee is charged, renders it proper, in their judgment, to advert briefly to the political condition of that portion of Virginia embracing the seventh congressional district on and for a short time prior to the 23d of May. In doing this to the extent deemed necessary to our purpose, we shall take occasion to refer to but very few facts except such as are set forth or implied in the *memorial* of the incumbent.

The ordinance of secession, as it was called, passed by the convention of Virginia, was adopted on the 17th of April, then and for some time previous in session at Richmond. This proceeding was entitled "An ordinance to repeal the ratification of the Constitution of the United States by the State of Virginia, and to resume all the rights and powers granted under said authorities." On the same day with the passage of this ordinance the governor of Virginia issued his proclamation acknowledging the independence of the Confederate States, and requiring all the military forces of the State to hold themselves in readiness for immediate orders. These proceedings inaugurated the rebellion against the government of the United States now existing in the whole of the eastern part of the State, and set on foot a revolutionary government. Since then the people and the government *de facto* have been in open and avowed hostility, and in armed resistance to the authority of the general government.

On the 22d of April General Robert E. Lee, on the nomination of the governor, was appointed by the convention commander of the military and naval forces of the State. On the 24th of the same month the convention, claiming to be invested with *supreme authority* in the State, passed the following ordinance:

> The election for members of Congress for this State to the House of Representatives of the Congress of the United States, required by law to be held on the 4th Thursday of May next, is hereby *suspended* and *prohibited* until otherwise ordained by this convention.

On the 25th of the same month the acting authorities in Virginia entered into a convention or compact with the rebel government of the Confederate States, whereby the whole military force and military operations of the State

in its impending conflict with the United States were placed under the direction and control of the Confederate States. On the 4th of May the governor issued his proclamation, authorizing the commanding general to call out and muster into service such additional numbers of volunteers as he might deem necessary to repel the threatened invasion of Virginia by the troops of the United States. On the 14th of May the State was formally admitted as a member of the southern confederacy.

Although all of these proceedings of the governor, the convention, and the other acting authorities of Virginia, were *usurpations* upon the rights of her people, both as citizens of the State and of the United States, and in their nature revolutionary, yet it appears that if not universally approved, they were generally acquiesced in by a very large majority of the people in the whole of the eastern part of the State.

That such was the fact throughout the seventh congressional district is very conclusively shown by the memorial of the incumbent. For the purpose of showing the state of public sentiment in this district in respect to these revolutionary proceedings of the authorities *de facto*, and his own position and action as a candidate for Congress, the incumbent has thought proper to cite in his memorial extracts from several newspapers of the day, all published within a few miles of his own residence; not doubting that these extracts exhibit the common sentiment of the people of the district fairly, as it was manifested at the time, we have embodied some of them in this report:

[From the Alexandria Gazette of May 17.]

Mr. Charles H. Upton, of Fairfax county, has authorized an announcement that he is a candidate to represent the seventh congressional district in the next Congress of the United States, "upon the basis of the maintenance of the Union," and asking the Union men to furnish him with the evidence of their wishes. As the convention of Virginia has, by ordinance, declared that no election for members of Congress shall be held in this State at the ensuing election—as that ordinance is the law of the State—as an attempt to resist or contravene the ordinance would be highly illegal and improper, we trust that no one will countenance this proceeding by taking a vote or holding a poll; and we have no doubt that those who are not in favor of secession will themselves condemn most pointedly that which can only promise mischief, and bring trouble upon parties persisting in being concerned in it. However, it is probable that all will, upon reflection, see the good sense of dropping the whole matter at once.

[From the Fairfax County News of May 17.]

ELECTION OF CONGRESSMEN.—The convention of Virginia, representing the sovereignty of the people of the Commonwealth, and therefore speaking with *supreme authority*, passed the following on the 24th ultimo:

"The election for members of Congress for this State to the House of Representatives of the Congress of the United States, required by law to be held on the fourth Thursday in May next, is hereby *suspended* and *prohibited* until otherwise ordained by this convention."

The obedience of every citizen of the State is not only due to the above, as the sovereign act of the Commonwealth, but is enforced by the pains and penalties of the law against treason.

[From the National Intelligencer of May 20.]

FREEDOM OF OPINION.—The Alexandria correspondent of the Richmond Examiner has the following paragraph in one of his late letters:

"There is some talk here of an attempt to vote for a representative to the Congress of the United States from this district. While I am strongly opposed to lynch or mob law, I think a case might arise when it would be necessary to inflict some kind of a summary punishment, and an attempt of the kind alluded to would seem to be a case where the forms of law might be dispensed with."

It appears, then, from the facts that we have cited from the history of the times, and from the foregoing evidence, that the authorities which had usurped and then had control of the civil government and military forces of the State had, for the time being, set at defiance and annulled the lawful authority of the United States, and deposed or driven off its officers, practically severed the ties and abrogated and repealed all laws that bound the State to the general government of the United States. All this was done, for aught that is shown to

the contrary, with the approval and concurrence of a very large majority of the people, and without the effective opposition of any of them. The law of the State providing for the election of members of Congress on the 23d of May was regarded and treated by the governor, sheriffs, commissioners, and other officers charged with the duty of seeing it carried into effect, with the exception at most of those of a single election precinct, as suspended, and for the time being as practically repealed. This course of the election officers appears to have been adopted and pursued without remonstrance or objection from any considerable number of the people of the 7th congressional district. The great body of the people in the district seem to have acted upon the belief that on the 23d of May there was no law in force in the State which would enable them, if so disposed, to elect a member of Congress, nor was there any evidence before the committee that any very considerable number, if they had had the power, would have had the inclination to exercise it. Such being the state of the district, it is a question well worthy of grave consideration whether its political condition was such that any election for a member of Congress at that time should be held legally valid either under the law of Virginia, or of the United States, even were the evidence of such election clothed with all the ordinary forms of law.

This state of public sentiment in the district and its political condition appear to have been fully understood and appreciated by the incumbent. He seems, notwithstanding, to have been very unwilling that the benefit of representation in Congress should be abandoned, without at least an effort on his part to save it. His personal solicitations to other gentlemen to become candidates, the repulses he met with from them, the mode in which his own name was brought before the people, the difficulties he encountered, his persistent efforts, and the unusual, not to say abnormal, manner of conducting the election he recommended, are, we have no reason to doubt, as truly as graphically stated in his memorial and address to the people of the district, from which we quote as follows:

Immediately after the adjournment of the Richmond convention I went to Alexandria and called upon Hon. George W. Brent, who was a member of that body, (and elected by a very large majority as a Union candidate,) and requested him to announce himself as a candidate for Congress. He peremptorily refused. I then called upon Lewis McKenzie, esq., to take this position. He also declined. I then wrote a card announcing myself as a candidate, and again visited Alexandria with a view to its publication in the Gazette, a paper of large circulation in the seventh district, then published in that city. The editor of the Gazette promised to publish the announcement until the day of election, but failed to redeem his promise. Having waited for the fulfilment of the promise a reasonable time, I announced myself a candidate in two papers of this city—the Republican and Star—and also issued a circular addressed to the people, of which the following is a copy:

"ADDRESS.

"FALLS CHURCH, FAIRFAX COUNTY, *May* 15, 1861.

"On Friday last I visited Alexandria, and placed the subjoined announcement in the hands of the editor of the Gazette, who promised to publish the same if I would omit the portion contained in brackets. I consented to this change, but the promise has not been kept:

"'*To the voters of the 7th congressional district:*

"'I hereby offer myself as a candidate for election to represent you in the next (37th) Congress of the United States, upon the basis of the maintenance of the Union. [The recent convention at Richmond, called without authority, and usurping all authority, has undertaken to set aside the supreme law of the land in reference to elections to Congress.—Acts 1852-'53, ch. 3, § 7, p. 4.] As, therefore, in most of the precincts throughout the district no poll will be opened for members of Congress, I call upon Union men to *open side polls*, and preserve the evidence of the wishes of the people, a copy of which may be transmitted to me, at Falls Church, Fairfax county, or to Hon. John W. Forney, clerk of the House of Representatives, at Washington.

"'CHARLES H. UPTON.'"

It was claimed by the incumbent that, in pursuance of his recommendation, "*side polls*" were opened for those wishing to vote for him at five different voting precincts in the district, at which he received in the aggregate ninety-five votes. Certain documents were submitted to the committee, containing lists of the names of the persons said to have so voted, as evidence of his claim to have the benefit of these votes. These documents were merely the lists of names of certain persons subscribed to written statements reciting or referring to the fact that *no regular polls* had been opened for member of Congress; that they had been *deprived* of the *opportunity* to vote or been *deterred* by threats, and they *therefore voted* for the incumbent. It was very evident to the committee that the votes claimed to have been so cast at these "*side polls*" were not cast in conformity with any law at that time or heretofore in force in Virginia for the election of candidates to Congress; they were not given at the place of voting in the precinct, nor received by any election officer, nor certified or authenticated by any magistrate, or commissioner, or conductor of an election, nor proved by the oath of any witness. The incumbent himself did not seem to insist with very much confidence upon his right to have the benefit of the votes above referred to, but appeared to rely, for the proof of the *legality* of his election, mainly upon certain votes supposed to have been cast for him at an election precinct called *Ball's Crossroads*, in the county of Alexandria.

The time for the election of members of the 37th Congress was fixed on the 4th Thursday of May last, by an act of the legislature of Virginia passed in the year 1853. An election was held on the same day throughout the State for senators and delegates to the State legislature. The committee subjoin below a complete copy of the document submitted to them as the *poll-book* kept at Ball's Crossroads, and which, as has been before stated, was mainly relied on by the incumbent as proof of his claim:

Poll for delegates to the house of delegates, and other officers, Thursday, May 23, 1861.

NAMES OF CANDIDATES AND OFFICES.

Names of voters.	State Senate.		House of delegates.				Members of Congress.	
	Henry W. Thomas.	Louis McKenzie.	Wm. G. Cazenove.	Ed. Snowden, jr.	Louis McKenzie.	H. S. Wunder.	George W. Brent.	Charles H. Upton.
T. B. Lawson	1			1				
George Veitch	1		1					
William Burch	1		1					
John Hicks	1			1				
John W. Veitch	1		1					
James Roach	1		1					
T. B. J. Fryy	1		1					
Ed. Leble	1		1					
H. S. Wunder	1			1				
Wesley Carlen	1			1				
John R. Johnston	1		1					
George R. Herrick	1			1			1	
George C. Jackson	1		1					

Poll for delegates to the house of delegates. &c.—Continued.

Names of voters.	State Senate.		House of delegates.				Members of Congress.	
	Henry W. Thomas.	Louis McKenzie.	Wm. G. Cazenove.	Ed. Snowden, jr.	Louis McKenzie.	H. S. Wunder.	George W. Brent.	Charles H. Upton.
S. L. Summers	1	.....	1	.....	.....	.....	.....	.....
William J. Minor	1	.....	1	.....	.....	.....	.....	.....
George A. Thomas*	1	.....	1	.....	.....	.....	.....	.....
James C. Roach	1	.....	1	.....	.....	.....	.....	.....
William R. Burch	1	.....	.....	1	.....	.....	.....	.....
H. W. Febry	1	.....	.....	1	.....	.....	.....	.....
Richard Williams	1	.....	1	.....	.....	.....	.....	.....
Noah Drummond	.....	.....	.....	.....	1	.....	.....	.....
J. T. Ball	1	.....	1	.....	.....	.....	.....	.....
William F. Carlin	1	.....	1	.....	.....	.....	.....	.....
J. A. Cisson	.....	1	.....	.....	.....	1	.....	1
Marcus Pearl	.....	1	.....	.....	.....	1	.....	1
Allen Pearce	.....	1	.....	.....	.....	1	.....	1
John W. Bowen	1	.....	1	.....	.....	.....	.....	.....
Thomas Hitchcock	1	.....	1	.....	.....	.....	.....	.....
Robert Donaldson	.....	1	.....	.....	.....	1	.....	1
John Burch, jr	.....	1	.....	.....	.....	1	.....	1
Smith Minor	1	.....	1	.....	.....	.....	.....	.....
W. D. Nutt	1	.....	1	.....	.....	.....	.....	.....
T. J. Suddath	1	.....	1	.....	.....	.....	.....	.....
William C. Veitch	1	.....	1	.....	.....	.....	.....	.....
C. E. French	.....	.....	.....	.....	.....	.....	.....	1
Thomas A. Tucker	1	.....	1	.....	.....	.....	.....	.....
R. S. Shreves	1	.....	.....	1	.....	.....	.....	.....
George O. Wunder	1	.....	.....	1	.....	.....	.....	1
Isaac A. Veitch	1	.....	1	.....	.....	.....	.....	.....
E. J. Oxley	1	.....	.....	1	.....	.....	.....	1
Harvey Bailey	1	.....	.....	1	.....	.....	.....	1
B. F. Crabb	1	.....	1	.....	.....	.....	.....	.....
E. S. Javens	1	.....	1	.....	.....	.....	.....	.....
James Reynolds	1	.....	1	.....	.....	.....	.....	.....
J. T. Clark	1	.....	1	.....	.....	.....	.....	.....
N. B. Clarvoe	1	.....	1	.....	.....	.....	.....	.....
Richard A. Veitch†	1	.....	1	.....	.....	.....	.....	.....
George W. Donaldson	.....	.....	.....	.....	.....	.....	.....	1
C. B. Graham	1	.....	1	.....	.....	.....	.....	.....
William Shreves	1	.....	.....	1	.....	.....	.....	.....
O. P. Evans*	1	.....	1	.....	.....	.....	.....	.....

* In camp. † From Alexandria.

COUNTY OF ALEXANDRIA, *to wit:*

This day personally appeared before me, a justice of the peace in and for said county, H. S. Wunder, Wesley Carline, H. W. Febry, Richard Southern, commissioners appointed to superintend an election to be held at Ball's Crossroads, in said county, on the 23d day of May, 1861, for a State senator and member of the house of delegates, and made oath that they would faithfully execute the office of commissioners.

Given under my hand this 23d day of May, 1861.

JOHN R. JOHNSON, *J. P.*

COUNTY OF ALEXANDRIA, *to wit:*

This day personally appeared before me, a justice of the peace in and for the said county, Noah Drummond, conductor appointed to conduct the election to be held at Ball's Cross-roads, in said county, on the 23d day of May, 1861, for a member of the house of delegates and a State senator, and made oath that in conducting the said election he would not attempt to influence the vote of any one, or be guilty of partiality for any candidate or person voted for, and as far as depends on him he would make a true return of the result of the election according to law.

Given under my hand this 23d day of May, 1861.

JOHN R. JOHNSON, *J. P.*

COUNTY OF ALEXANDRIA, *to wit:*

This day W. B. Lacy personally appeared before me, conductor of election at Ball's Cross-roads, in said county, and made oath that in the election about to be held at Ball's Cross-roads, in said county, he would record the votes for the candidates faithfully and impartially.

Given under my hand this 23d day of May, 1861.

NOAH DRUMMOND,
Conductor of Election at Ball's Crossroads.

ALEXANDRIA COUNTY:

Having carefully examined the above and the within transcript, from the poll-book of the conductor of the election held at Ball's Crossroads on the 23d day of May, ultimo, I hereby certify that the comparison shows the same to be a correct copy.

Given under my hand this 1st day of July, 1861.

H. S. WUNDER, *J. P.*

On the face of this document it appears that *ten* votes were cast at that precinct for the incumbent, and *fifty-one* for State senator and delegates. Below the schedule of votes, or on the back of it, there purports to be indorsed the *oath* of *the commissioners*, of the *conductor*, and of the *recorder* or *writer* of the election. Below these there is the certificate of a magistrate, of the date of July 1, 1861, that he had examined this document and compared it with the poll-book of the election held at Ball's Crossroads on the 23d day of May, and that he found it to be a correct copy. The foregoing is all the testimony (if it can be called testimony) adduced before the committee that the incumbent received *ten*, or any other number of votes, at Ball's Crossroads.

The only witnesses called by him to testify in respect to the election held at that precinct were Richard Southern, a commissioner, and Noah Drummond, the conductor, but neither of these witnesses testifies that *ten* or *any other number of votes* were cast for the incumbent. The testimony of Richard Southern upon this point is as follows:

Question. Were you one of the commissioners for holding the election at Ball's Cross-roads on the 23d day of May last?

Answer. I was.

Question. Was the poll opened there for a member of Congress?

Answer. Not by the order of the governor of Virginia. There was a poll opened there for a member of Congress, by the conductor and four of the commissioners.

Question. Were there armed men present, belonging to the army of Virginia, endeavoring to prevent the opening of the polls?

Answer. There were armed men, but they did not prevent the opening of the polls. There was one officer came into the room, and looked upon the poll-book, and saw your name upon the margin for member of Congress, and I heard him say that if he could get a sight of Upton "he be d——d if he should ever take a seat in Congress."

RICHARD SOUTHERN.

A part of that of Noah Drummond as below:

Question. (By S. F. Beach.) What has been the average vote for several years past at Ball's Crossroads?

Answer. From ninety to one hundred and forty-two. The latter was the heaviest vote I have known there.

Question. (By same.) Was there an election on the day mentioned for State senator and delegates?

Answer. There was.

Question. Was the usual and average vote cast for those candidates?

Answer. There were a little upward of a hundred votes cast. There were *seventy-nine Union votes* and *thirty-one* secession votes.

Question. (By same.) Were the polls opened on that day on the question of ratifying the ordnance of secession?

Answer. Such polls were opened.

It will be observed that the witness, Drummond, states that at the election in question, 79 *Union* votes and 31 *secession* votes were cast for State senator and delegates, making in all *one hundred and ten.* But it will be seen that in the document produced by the incumbent as the poll-book of that election, only fifty-one votes were cast for those officers. It necessarily follows, if Drummond's testimony is reliable, that the document produced by the incumbent is not a copy of the poll-book kept at Ball's Crossroads on the 23d of May, and therefore it could have no weight as testimony even if authenticated in due form of law.

That it was not authenticated in due form, or in such manner as to make its contents evidence for any purpose, will abundantly appear by reference to the election laws of Virginia. The law of that State provides that the county court shall, biennially, appoint *five* freeholders *commissioners* of election for each place of voting in the county, any two of whom, together with another officer called the *conductor*, are authorized to hold the election. After the polls are closed the correctness of the poll-book is required to be certified by the commissioners and conductor. It is then made the duty of these officers within five days after the commencement of the election to report and deliver the poll-book so certified to the officer conducting the election, at the court-house in the same county. In the case of a congressional election, these last-named officers in the several counties in the district meet, canvass the poll-books, make out a certificate of the result, one of which is transmitted to the governor. On the receipt of this certificate the governor issues his proclamation declaring the successful candidate elected.

At the time of this election, as we have seen, the governor of Virginia was in open rebellion against the United States, and there can be but little doubt that most if not all the sheriffs and conductors of the elections at the several court-houses in the district, if not in active rebellion, were disloyal. Such being the fact, it would have been impracticable for the incumbent to have procured the ordinary evidence of the number of votes he might have received as required by the law of Virginia, whatever that number might have been. This case would then have come within the reason of the principle held by this house at its present session in the case of Andrew J. Clemens, from the 4th district of Tennessee. But in that case the evidence satisfied the committee that from 1,500 to 2,000 legal votes were cast for the successful candidate, and that these votes, at least in one entire county, were duly and legally authenticated by the certificates of the officers conducting the primary elections in the county, and also legally returned by the sheriff.

But in the matter of the election at Ball's Crossroads, not only was no return made to the sheriff or conductor of the election at the court-house, in Alexandria county, but the result of the election was in no manner certified, authenticated, or proved by the officers conducting the election at that precinct, or in any other mode known to the law. The testimony shows that the election, on the 23d of May, was held at that precinct by *four commissioners* and a *conductor*, and under the law of Virginia the poll-book should have been certified by all of them. But there is not only no evidence that it was certified by either of these officers, but no reason shown why it should not have been, if the result of the election was such as it is claimed by the incumbent.

In view of the foregoing facts, the committee are constrained to come to the conclusion that the incumbent has produced no evidence, which, either under

the statutes of Virginia, or in accordance with any precedent known to them, should be admitted as satisfactory proof that *any* votes were legally cast for him as a candidate for representative to the 37th Congress, either at the voting precinct at Ball's Crossroads, or elsewhere in the 7th congressional district.

Your committee, in view of the foregoing conclusion, submit to the consideration of the House the following resolution:

Resolved, That Charles H. Upton is not entitled to a seat in this house as a representative of the 7th congressional district of Virginia.

In the view the committee have taken of this case, they have not deemed it necessary for them to express any opinion upon the question whether, in a congressional district containing from 6,000 to 8,000 legal voters, the votes of so few as *ten* electors, even if properly authenticated and clothed with all the forms of law, would furnish that evidence of a claim to a seat in this house that ought to be regarded as conclusive of the title. The proper time to determine this question will be when a case shall arise that makes a decision of it more indispensable than the one now submitted to the committee.

It was very apparent, from the evidence before the committee, that but a very small portion of the voters in this congressional district could have been in any way apprised that the incumbent was, on the 23d day of May, a candidate for Congress. It is probable, from the testimony, that not one voter in ten, of the whole number, could have known, at the time, that the incumbent, or any other candidate, was seeking an election to that office.

What the *legal effect* of this general ignorance and want of notice to the voters would be, in itself considered, independently of all forms of law, is a matter of very great doubt, and well worth grave consideration. *Election* implies *choice*, and *choice* a state of mind in reference to the object of it the reverse of ignorance. With what propriety a person may be said to be *elected* or *chosen* as a representative to Congress in a district in which nine-tenths of those interested in the election had no knowledge that he or any one else was a candidate, we do not readily or clearly see. If it should be suggested that those who do not go to the polls are presumed to *acquiesce* in the action of those who do, would not that presumption be sufficiently rebutted by the proof that those who did not go were not only ignorant of the election, but acted under the belief that no election at the time could be legally held? These and some other similar questions, naturally suggested by the facts in this case, it is not now, in the judgment of the committee, necessary to consider, and any attempt at their solution may be postponed till it becomes more indispensable to determine them than at present.

In presenting the case to the House, Mr. WORCESTER said:

* * * * * * * *

It is made the duty of each State, under the Constitution of the United States, to pass laws fixing the time, place, and manner of holding elections for members of Congress. The Constitution in that respect is mandatory upon each State. If a State has adopted a law regulating the election of members of Congress, that law may be repealed by the same power that has enacted it. The convention of Virginia claimed to exercise in what it did the powers of a legislature. Its acts and its ordinances were received, respected, obeyed, and had the force of laws in all that portion of Virginia east of the Blue Ridge. All of the executive officers of the State, from the governor down to the constable, lent their aid to enforce these ordinances. The courts gave the sanction of their judgments, and issued their processes for the execution of these ordinances. The archives of the State, the great seal, and all the emblems of authority were in the possession and under the control of this convention. These ordinances were respected and obeyed by the people in all the eastern portion of Virginia. The federal officers in that part of the State were either compelled to resign or were driven off, and no person was allowed to exercise the rights or to perform the duties of an office in that portion of the State without first renouncing his allegiance to the government of the United States and taking an oath of fealty to the new government. From what the committee can understand, it appears that at the time referred to the law for the election of members of Congress was not only in terms suspended by the convention, but the election officers appointed to carry that law into effect were superseded. There were, therefore, no officers who could vote it.

The Committee of Elections fully admit that all of these acts of that convention were revolutionary, that they were usurpations, that the people of the eastern portion of Virginia were neither legally nor morally bound to obey them. The very term usurpation, however, implies that the party who usurps has the control and possession of the rights and powers which he has usurped. The question is simply one of fact—not whether it may have been legally right for the people of the eastern portion of Virginia to elect a member of Congress in the month of May last, but whether it was legally, physically possible for them to do so. But the sitting member claims—and he must claim in order to support his case—that this elective law of 1853 was not only in force, but that he was elected in all respects in pursuance of that law. The Constitution of the United States prescribes the qualifications of a person entitled to a seat as a member of this house. It requires that he shall be of a certain age, that he shall be an inhabitant of the State from which he comes, and that he be a citizen of the United States for a certain length of time. The Constitution of the United States makes this house the judge of the qualifications of its own members; and when the House sits judicially on the qualifications of its members, the Constitution of the United States is the rule by which its decisions are to be governed. The Constitution provides that each State shall prescribe the time, place, and manner of electing members of Congress, until such time as the State laws may be altered or amended by the Congress of the United States. When this house sits in judgment upon the election and return of one of its members, the law of the State from which the member comes, and under which he claims to hold his seat, is the rule by which it is to be governed.

The question now to be considered is whether the law of 1853, under which the sitting member claims his seat, was in force at the time; and if in force, whether the sitting member was elected in accordance with the provisions of that law. The laws of the several States in regard to the election of members of Congress differ essentially in most of the States. In one State the voting is done by ballot, and in another *viva voce*. In one State the election board consists of two persons, and in another five or more. In one State the election is in the month of May; in another it is in the month of October. And it is self-evident that in order to determine the validity of the election—whether the member who claims a seat here is elected or not—this house must find, if in his favor, that he was elected in conformity to the laws of the State in these respects.

The law of Virginia under which the sitting member claims to hold his seat, as I have said before, was passed in 1853. It had been several times amended. It provided, among other things, that the court of common pleas in each of the counties of that State should appoint five persons, who are named in the law, as commissioners, for the purpose of holding elections in each of the election precincts of the county in which the court was held. They also appoint one other officer, who was called a conductor. Each of these persons had his duty to perform under the law. The commissioners, any two of whom might act as a board, were required, before entering upon the duties of their offices, to take an oath to faithfully perform those duties. They acted as the judges of election. The conductor was also an officer of the election, and was to see that order was preserved, and that the votes were properly recorded. This board was to determine, in the first instance, who had a right to vote; yet their decision upon any particular case was not conclusive. If the vote of any person was challenged, he still had the right to have that vote recorded as a challenged vote. The voting was *viva voce*, and not by ballot; and as the votes were announced by the voters they were recorded by the recorder of the election. After the voting was closed, the law required that the poll-book in which the votes were recorded should be certified as to its correctness by all the persons who held the office of judges of election. If there were five commissioners, it was to be certified by them all, and also by the conductor. After these votes were recorded, and the poll-book certified to be correct by those officers, the law required that they should be returned to a certain other election board at the court-house of the county. This second board was required by the law to revise the poll-books, and strike from the list of voters the names of any persons not entitled to vote. After this list is so revised, the law provided that within a certain time they should be returned from the several court-houses of the district to the court-house of the county first named in the law making the district, where they are to be revised by a third board, who make out a certificate of election for the successful candidate, and return it to the governor of the State. Upon the receipt by the governor of the certificate certifying the election of the successful candidate, it was made the duty of the governor to issue his proclamation declaring the election of the successful candidate.

This certificate or proclamation, under the great seal of the State of Virginia, is the kind of credential that every person elected to Congress from the State of Virginia is entitled to hold as the evidence of his right to a seat in this house. It is the kind of evidence that every person who holds a seat in this house either has or is entitled to have from the executive of the State from which he comes. And if he does not bring with him a certificate, emanating from the executive, showing that he is elected, he ought to be able, upon the contest for a seat before this house, to produce evidence showing that he is entitled to a certificate of that character.

But the contestant in this case brings to this house no such certificate; nor does he bring to us any certificate from any election board from the seventh congressional district. He

brings to us no certificate of any description—nothing that shows or which tends to show that a single vote was ever cast for him.

The subjoined extracts are from Mr. Sedgwick's argument:

Mr. SEDGWICK. * * * * * *

Now, I desire to state in the outset a fact which everybody in the House knows, and which appears on the papers here—that none of the members from Virginia, who took their seats here in July, complied fully with the election law of Virginia in force at the time of their election, namely, in May, 1861. They complied, each of them, as far as the revolutionary proceedings of their respective districts permitted, and were admitted on the ground that full compliance was rendered impossible, and, therefore, unnecessary, by such revolutionary proceedings. The law of Virginia provides that these commissioners and conductors of elections shall make returns of the poll-book, with their certificate, to the sheriff of the county; that the sheriff shall return it with his certificate to the governor of the State; and that the governor of the State shall issue a proclamation or certificate of election to the several members who appear to have been elected. Just so far as compliance with this law was possible, it was followed out by all the representatives from Virginia, who were admitted to seats on this floor. I say, therefore, that in admitting these members, this house has determined and decided by its action that the election law of Virginia had not been abrogated by the revolutionary proceedings of the State authorities or convention; that an election under it was valid; that there was a law in force at the time when this gentleman claims to have been elected; that proceedings under that law were valid and constitutional; and that it was unnecessary to pursue the forms provided by that law any further than the political condition of their respective districts would allow. Now, under that law, the sitting member claims his seat. He was guilty of no fraud. He proceeded openly and in good faith to procure an election on the day and in the mode prescribed by the law of the State which we have determined to have been then in force, and not abrogated by the revolutionary convention of that State.

* * * * * * * *

Now, the right of the sitting member to a seat is denied by the Committee of Elections on two grounds, to which I desire for a moment to call the attention of the House, and then I have done with what I desire to say. The first is, that the election law of Virginia was not complied with. As I said before, and repeat now, this is true of all the districts represented in July. Compliance was regulated by power and by the situation of the respective districts. None of these gentlemen produced the certificate of the governor that he was elected a member of Congress, because the governor was a traitor, and would grant no certificate that differed from the ordinance taking that State out of the Union. Some produced the certificates of loyal sheriffs, to whom the commissioners of elections made returns. That they were enabled to do, because in some of the counties of Virginia the sheriffs remained loyal to the government. When the sheriffs were traitors, the returns of the loyal commissioners would of course be suppressed.

Then we go back to inquire whether there were any loyal commissioners who dared to open the polls and hold irregular elections in which the wishes of the electors might be expressed. That we find to have been the case here. In this portion of the State, at least, the commissioners were loyal men, and they opened the polls and held elections for members of Congress. Now what is the principle which should control us? That the law of Virginia in relation to elections should be complied with so far as treason and revolution would permit, and no further. And that is precisely the principle upon which all these gentlemen stand and claim their seats. And when any man claiming an election under the law goes as far as the situation of his own district would permit, then he has done all, except what is excusable, in carrying out the law of the State.

The second objection of the Committee of Elections to the right of this claimant is one to which I desire to call the especial attention of the House. It is, that the ordinance of the Virginia convention, dissolving the connexion of that State with the general government, should be allowed by this Congress to have such force and effect as to suspend and prohibit the election of members of Congress. If it had such power and force in the election in the seventh district, it had such power in all the districts; and it is a matter of vast importance to this house to settle what validity they will give to this ordinance of the convention of Virginia. The committee say, and undertake to prove, that this ordinance was acquiesced in by a majority of the people. They say that it

"Practically severed the ties and abrogated and repealed all laws that bound the State to the general government of the United States. All this was done, for aught that is shown to the contrary, with the approval and concurrence of a very large majority of the people, and without the effective opposition of any of them. Such being the state of the district, it is a question well worthy of grave consideration, whether its political condition was such that any election for a member of Congress at that time should be held legally valid, either under the law of Virginia or of the United States, even were the evidence of such election clothed with all the ordinary forms of law."

There this doctrine, which I say is a dangerous and revolutionary doctrine, is proclaimed by the Committee of Elections as controlling and governing this case. They undertake to

give effect to the ordinance of a rebel State which severs its connexion with the general government, and makes any proceeding invalid under the preceding laws of the State of Virginia. I say that that doctrine recognizes the establishment of this traitorous government, wherever a majority of the people assent to it, in any State of this confederacy. And I say it is a doctrine as dangerous and as weak as any that Jeff. Davis or any of his cabinet has ever claimed in any period of this controversy. I ask this Congress to pause before they establish this doctrine of the committee. I ask them to reflect before they give effect to the ordinance of a rebel State, which undertakes to nullify the laws under which members of Congress hold their seats. I ask if loyal citizens have not rights, and whether they shall not have encouragement and support, in their resistance to treasonable measures, by this Congress; and whether, in addition to the pains and penalties which are threatened by revolutionary governments in their own States, you will disfranchise every loyal inhabitant of the State of Virginia? Their own State pronounces them traitors, and you say that the same act shall have such force and effect with you as will disfranchise them. I say this is an important question, and if the principle is true, it should shut out all members elected under that law in May last in the State of Virginia. It is not too late. These men all stand upon the same foundation. You have admitted members from several districts in Virginia, claiming no other and no better title to a seat than the gentleman now on trial before you. They have all taken their oaths as members of this house; and now this committee have labored through several pages of their report, to establish the doctrine that the treasonable convention of Virginia abrogated its laws, and therefore that these men have no shadow of a foundation for their claims as members of this Congress. In that view of the case, this is a most important question for the House to decide.

And now, gentlemen, I am disposed to leave this matter to the judgment of the House. It is claimed, and the members of the committee in debate upon this floor have claimed, that we should register its edict, because the Committee of Elections were unanimous in recommending that this person shall not be admitted to his seat. This is dangerous ground. I say the members of this house should be independent in their judgment upon questions of this importance, without being influenced by the decision of any committee. Why, this doctrine that the committee are infallible and cannot err, would have kept the arch traitor Bright in his seat in the Senate, because the Judiciary Committee of the Senate unanimously agreed that he was entitled to retain his place. [A Voice. There was one dissenting voice.] One dissenting voice, a gentleman says. I say that men should rely upon their own judgments, their own sense of right and propriety; and they should say whether, in their own judgments, this district in Virginia, represented here now by a loyal and true man, as all his opponents admit, should be disfranchised, and be driven in disgrace from this house because the committee are unanimous in their decision upon it: and whether his constituents shall be unrepresented here because, by violence and fraud, by the action of a traitorous convention and a traitor governor, he has been deprived of the ordinary proofs of his election, to which, in peaceful times, he would have been entitled. Upon these grounds I shall vote that the gentleman from the seventh congressional district of Virginia is entitled to retain his seat as a member of this house.

In closing the debate Mr. DAWES spoke at length. The following extracts are from his speech:

I said I desired to discuss this question stripped of technicalities, and to look at the naked facts. Now, sir, the naked facts are, I doubt not, that ten men, on the 23d of May, legal voters of the seventh congressional district of Virginia, did deposit their ballots in a ballot-box for this incumbent. I admit that; I believe it to be true. But, Mr. Speaker, the gentlemen who have advocated his claim to his seat upon this ground have all set out with the assertion that his claim rested entirely upon ten legal votes. I ask what is meant by ten legal votes? Do gentlemen desire to stand upon that proposition, or do they desire, as every one has done, the moment after making the assertion to depart from it, and say the condition of things was such in the district that they could not comply with the law? Which is the proposition gentlemen desire to stand upon?

I propose, as a member of this house, to discuss both propositions. I believe every gentleman who has advocated the claim of the incumbent, with the exception of my friend from Ohio, [Mr. Harrison,] has started out with the proposition that he has ten legal votes, and then immediately departed from his adherence to that proposition, and undertaken to say that, in the condition of things in that district, a strict compliance with the law was impossible, and that it should not be required of the incumbent.

Now, I understand ten legal votes to mean not only that the votes were cast on a legal day—because if that is not done anybody may be elected—but something more is necessary than that they should have been cast on the legal day to make them legal votes. It is not enough to say that they were legal voters; for, if that is all that is necessary, they could express their opinions in any way or manner whatever, and the forms of law would be of no avail. Legal votes I understand to be votes cast by legal voters in conformity to law; that is, in the form and manner required by law. That I understand to be legal voting.

But I am not going to stop with saying that if this man has not ten legal votes he ought not to retain his seat. I am starting out with the proposition assumed by all who have advocated the claims of the incumbent, that he has ten legal votes, and asking the House to

look into the facts. I agree with all parties that it is our duty sometimes to look beyond the question whether a man's vote has been cast in conformity with law or not, but I want first to settle the question whether these ten votes were legal votes or not.

Now, let my friends look into these papers, and they will see that ten men, on the legal day—if I may use the expression—deposited their votes for the incumbent in a ballot-box. I am ready to presume that they were legal voters, and therefore I state the proposition as I admit it, that ten legal voters, on the day by law required, deposited their votes for Mr. Upton in a ballot-box.

Mr. UPTON. The gentleman from Massachusetts has several times repeated, and I did not like to interrupt him, that those votes were deposited in a ballot-box. That is not the method of voting in Virginia. They keep a poll-book, and record the names of the voters.

Mr. DAWES. I stand corrected. I believe that is the law, although the first time the gentleman has informed me of the fact is at this moment. Ten men then, *viva voce*, cast their votes for this man, and so far it is in conformity to law. But yet it is not in conformity to law, for there was no poll opened to begin with, according to law. There was no sworn judge or inspector to receive these votes, and therefore it is precisely the same if the voters rose up in the presence of the Speaker of this house and gave their votes, or if they rose up in the presence of the gentleman from Virginia himself, or anybody else. There was no poll opened for member of Congress, according to the provisions of law; no man sworn to receive votes for member of Congress, according to the provisions of law; it was precisely this, and no more, that ten men, before an irresponsible person, not required by law, not authorized by law, gave their votes *viva voce* for this man. The law of Virginia is just as plain upon this point as any other; it requires that it shall be done before sworn inspectors and judges—sworn to receive votes for member of Congress, in a particular manner, with the oath set out in words in the statute.

That was departed from. Then the law requires that these men who take these votes, being sworn officers, shall certify to them—certify the number and the persons for whom the votes were given.

If you will look to the 19th page of this document you will see that there is not a particle of evidence that the law was complied with in this respect. These men acting as judges and inspectors of this election took the oath to receive votes for other officers, but not for members of Congress. That is what they say. They did not vote themselves, and they took care, in view of the pains and penalties of treason that hung over them, not to put their necks into such a halter. They did not vote themselves, and they did not certify that anybody else voted. There is no record to be found, "under heaven or among men," that a single man cast his vote there. Two of those men have been sworn upon the stand as witnesses, and they have sworn to about everything else that could come into the heads of the contestant or the incumbent, but they have not testified that even a single vote was cast for member of Congress there. Why is it, let me ask in all respect, that members of this house start out and say that ten legal votes were cast for this man, when the papers show conclusively that not one legal vote was cast for him—not a vote?

That, sir, is a fact that nobody controverts the moment he attempts to argue the case. With the exception of my friend from Ohio, [Mr. Harrison,] there has not been an argument for the claims of the incumbent that has not, the moment it commenced, admitted that the law has not been complied with. Then should we depart from the law? Do we ever depart from the law and give seats to members upon this floor? Certainly we do. Certainly it is our bounden duty on occasions to disregard the fact that forms of law have not been complied with by voters, so that—and this is the essence of it—the voice of the voters of the district may be heard; so that the voice of the voters of the district shall have effect; so that if the electors of the district have striven to give effect to their voices they shall not be thwarted in that purpose by mere shells of forms which do not contain the real substance. Is that the fact here? That is the pertinent inquiry.

Our first duty is to see whether this election conforms to law. Having seen that it does not conform to the law, and no one claims that it does conform to law, our next duty is to inquire into the circumstances of the case, and see whether we can find in those circumstances any arguments which will justify us in putting aside the requirements of the law; and if we do, it is our duty to give effect to such an election. There is no difficulty in finding abstract principles which ought to govern these cases. It is their application in extreme cases that makes the task difficult.

Now, sir, we find in looking into this case that there were but ten men who voted for the incumbent. Not being bound by law, and not having the form of law in their selection, we search for reasons to give effect to the voice of those voters. We look into the nature and circumstances of the election to see whether it is of such a character as will justify us in laying aside the forms of law.

The House agreed to the resolution without a division. The vote upon an amendment deciding Mr. Upton *entitled* to the seat was—Yeas 50, nays 73.

NOTE.—The debate in this case occurs in vol. 47 Congressional Globe. For the report: Mr. Worcester, p. 975; Mr. Sheffield, p. 982; Mr. Loomis, p. 1006; Mr. Dawes, p. 1007. Against the report: Mr. Riddle, p. 978; Mr. Fessenden, p. 980; Mr. Sedgwick, p. 983; Mr. Dele ; Mr. Harrison, p. 1004.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

KLINE *vs.* VERREE, *of Pennsylvania.*

Where the contestant failed to specify with *particularity* the grounds of the contest, held that the requirements of the statute were not complied with, but contestant was permitted to specify orally the grounds upon which he based his contest.

Where it was alleged that there was a mistake in the original count, and upon reopening the boxes the allegation was apparently substantiated, as the boxes had been for three months in an insecure position, where they might have been tampered with, it was held that the recount should not overturn the original sworn returns.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 27, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

The third district of Pennsylvania is composed of the 11th, 12th, 16th, 17th, 18th, and part of the 19th wards of Philadelphia. The election here contested was held on the second Tuesday of October, 1860, which was the general election for State officers. The whole number of votes returned as cast at that election for representative in Congress was 18,204, of which there were returned for Mr. Verree 8,931 votes, for Mr. Kline 8,909 votes, and for Mr. G. J. Hamilton 359 votes, Mr. W. Morgan 5 votes, making Mr. Verree's returned majority over Mr. Kline 22 votes.

The several wards constituting this congressional district are subdivided into divisions or election precincts, at which the polls are opened and ballots received. The election at each of said divisions is conducted by one judge and two inspectors, who are chosen annually; and for the protection of minorities the law of the State of Pennsylvania provides that at the election of such inspectors each voter shall vote for but one, and that the two persons receiving the highest number of votes shall be declared elected inspectors. It sometimes happens, however, where one political party can give a majority larger than the entire vote of the other, a division of its vote can be so adjusted as to secure the election of both inspectors against the spirit and object of the law. Each inspector appoints one clerk to assist at the election, and upon the application of twenty citizens the court of common pleas can appoint three watchers to be present at each precinct.

It is made the duty of the judge in every election division on the night of the election to make out and subscribe a certificate of the votes there given, and on the next day to file the same with the prothonotary of the court of common pleas, and to return a duplicate of the same to a meeting of all the judges and inspectors from the several divisions of the ward, who are required to ascertain the vote of the ward, and return the same by one of their number, duly elected by them as return judge for such ward, to a meeting of the board of return judges, to be holden on the Friday next succeeding the election, whose duty it is to add together all the ward returns and issue the certificate of election.

Upon the receipt of a certificate from these return judges setting forth the number of votes cast for each candidate, ascertained in the foregoing manner by the secretary of state, it is the duty of the governor, by proclamation, to declare who is elected.

Mr. Verree was declared elected, as well by the certificate of the return judges as by the proclamation of the governor, and was admitted to, and still holds, the seat. Immediately upon the issue of the governor's proclamation, the contestant served upon the sitting member his notice of contest. As the sufficiency of this notice was the subject of much discussion before the committee, it is here copied in full:

PHILADELPHIA, *November* 7, 1860.

SIR: You will take notice that I will contest your right to a seat in the House of Representatives as the member from the third congressional district of Pennsylvania in the 37th Congress, the grounds of contest being as follows:

1. That at the election held on the 9th of October, 1860, *many persons voted illegally.*

2. That sundry persons in the sixteenth and eighteenth wards, "not white male citizens of the United States," *were permitted to vote for you.*

3. That many persons voted for you in the sixteenth, eighteenth, and other wards, on false *naturalization papers.*

4. That sundry persons, not residents of the State, voted for you in the *seventeenth and other wards.*

5. That sundry persons not of the age of 21 years were permitted to vote for you in the *eighteenth and other wards.*

6. That large sums of money were expended in the eleventh, seventeenth, and other wards, in procuring for you the votes of persons *not qualified electors.*

7. That in the fourth division of the nineteenth ward the poll was closed during the day, in violation of law.

8. That one of the election officers of the sixteenth ward stated he would make one hundred dollars inside, and urged on an officer of the twelfth ward to do likewise and help him to secure your election, for which he was to receive said one hundred dollars; and I believe that I shall be able to prove that said officer did commit a fraud to benefit you, and the effect of which fraud, so committed by him, was to secure you the certificate of the return judges.

9. That the returns made to the return judges are not correct. By fraud and error they were made out so as to give you a majority over me of the votes polled in said congressional district. This will appear by an inspection of all the papers returned by the officers of the election as required by law, in the nineteenth ward and other wards in said district.

10. The examination of the tally papers and all of the other election papers relating to said congressional election, and deposited in the office of the prothonotary of the court of common pleas, and deposited in the several ballot-boxes in said congressional district, together with a recount of all the ballots deposited in said ballot-boxes in said district at said election, will show that you were not elected, and that I was elected.

11. You will further take notice that I claim to have received a majority of all the votes legally cast at said election, and that I am therefore legally entitled to represent the qualified electors of the third congressional district of Pennsylvania in the *thirty-seventh Congress.*

Respectfully yours, &c.,

JOHN KLINE.

Hon. JOHN P. VERREE.

The sitting member, in answering said notice in conformity with the act of Congress, November 28, 1860, and before "admitting or denying the facts alleged therein," or "stating specifically any other grounds upon which he rests the validity of his election" as required by said act, took exception to this notice of contest for these reasons, viz:

That said notice is uncertain, vague, and indefinite, and not such a statement of the grounds of contest as is contemplated and required by the act of Congress in such case made and provided.

That the statements and allegations are so general in their character that I have not been able to anticipate or determine what you propose to prove; consequently I shall be unable to prepare for cross-examination, or to provide countervailing or rebutting testimony in my defence against those statements and allegations.

I therefore shall except to any testimony offered to be taken or taken by you under said notice.

The sitting member then proceeded with more particularity to specify his grounds of objection to each head of said notice, setting out in what respect the charges therein contained were defective by reason of uncertainty and generality, and concluding with specific denials. There was no amendment of the specifications on the part of the contestant. These objections to the sufficiency of the specifications of contest were removed when the evidence was taken before the magistrate; and at the outset of the hearing before the committee the sitting member filed a motion to dismiss the entire proceedings for the same reasons. These objections to the generality and vagueness of the notice of contest are more fully set out in the answer of the sitting member, to be found in Mis. Doc. 1st session, No. 6, page 11.

The committee were compelled therefore to pass upon the sufficiency of this notice before considering the merits of the case. They heard counsel of sitting member and contestant upon this preliminary question, and gave to its consideration much time and attention. As a question of practice it is of importance.

The statute of 1851 (9 Statutes, 569) enacts, that "whenever any person shall intend to contest an election of any member of the House of Representatives of the United States, he shall, within thirty days after the result of such election shall have been determined by the officers or board of canvassers authorized by law to determine the same, give notice in writing to the member whose seat he designs to contest of his intention to contest the same, and in such notice *shall specify particularly the grounds upon which he relies in the contest.*"

Did this notice specify *particularly* the grounds of this contest? It is proper to state that the contestant waived before the committee all grounds of contest, except such as may be found in the last clause of the tenth specification. The attention of the House is therefore called to this specification, and to the *particularity* of the grounds of contest which that clause in it contains. It is in the following words:

10. The examination of the tally papers relating to said congressional election, and deposited in the office of the prothonotary of the court of common pleas, and deposited in the several ballot-boxes in said congressional district, *together with a recount of all the ballot-boxes in said district at said election, will show that you were not elected, and that I was elected.*"

Without subjecting this specification to the criticism that the last clause is inseparably connected with the first, so that the whole must be taken together and constitute but one allegation quite different in its meaning from any just interpretation of the last clause, if standing alone, suppose it were a simple allegation, standing alone, that "a recount of all the ballot-boxes in said district will show that you were not elected, and that I was elected," in what just sense could it be said that such an allegation is a compliance with that provision of law which requires of the contestant to "specify *particularly* the grounds upon which he relies in the contest?" What is it, more or less, than the assertion, "you were not elected and I was," or "I received more votes than you?" The common-law pleading, "you did" and "I didn't," would have every element of "particularity" in it which is contained in such a specification. The only precedent under existing laws approaching this in vagueness and generality, which has come under the notice of the committee, is that of Vallandigham *vs.* Campbell in the 35th Congress. But there is this to distinguish that case from the present one: In that case the sitting member took no exception to the motion of contest for want of particularity when served upon him, or in his reply thereto, or during the taking of testimony; but, on the other hand, filed his own answer in the same general terms, and the contest proceeded without objection on either side till the hearing before the committee, where the objection was first raised, when it was too late for either party to retrace his steps or correct the mistake. Whatever might have been the opinion of that Congress as to the sufficiency of those specifications, it might well have been held in that case—indeed, it could not well have been held otherwise—that any such defect in specification or answer had been waived by the parties. But in the present case there could be no waiver. The exception to the sufficiency of this motion was taken at the earliest practicable moment, and in time for the service of a new notice. It was also renewed at the taking of the testimony and at every stage of the hearing. There was no excuse offered for a non-compliance with the law in this particular, and the committee could discover none.

The question was thereupon presented to the committee, shall parties contesting seats in the House of Representatives be held to conduct that contest

according to the requirements of the statutes of the United States, or be permitted, without expense, to depart from and disregard the plainest provisions of those statutes in this regard, founded in the plainest principles of justice and fair dealing? Long before the statute was enacted parties to contested elections, both in England and this country, were held to a compliance with the same rule.—(Leib's case, Clark & Hall, 165; Luttrell *vs.* Hume, 4 Doug. Elect. Cases, 25; Skerret's, 2 Pars., 509; Carpenter's case, 2 Pars., 537; Kneass's case, 2 Pars., 553.) Several of the cases here cited are from the State of Pennsylvania, and, so far as the local law of the State where this contest has arisen forms a rule for the guidance of the parties, are clear and decisive against the sufficiency of this notice of contest. And the committee, after a careful consideration of this question, have come unanimously to the conclusion that this notice is in no just sense a conformity with the requirements of the statute, or the well settled rules which should govern in all contests of this kind.

The committee have not felt at liberty to pass over this entire disregard of well settled rules and statute enactments without notice, lest proceedings like these should grow into precedents, and parties to contests should hereafter meet committees, not for the purpose of trying prepared and defined issues, but for the purpose of making vague and uncertain complaints, and indulging in endless and unsatisfactory discussions.

The committee were, however, induced, from a desire that no injustice might by any possibility be done the contestant, to permit him to orally "specify" and "particularize" the grounds upon which, under the last clause of the 10th specification, this contest is based. And they are, that in the 3d division of the 11th ward the division inspectors made a mistake in counting the votes for each of the candidates, to wit, that they counted for the sitting member ten more votes than he was entitled to, and the contestant seven less; and that by a like mistake in the 3d division of the 16th ward they counted for the sitting member sixteen more votes than he was entitled to, and for the contestant fourteen less. In the 4th division of the same ward, by a like mistake, they counted for the sitting member twenty-two *less* than he was entitled to, and for the contestant four *more* than he was entitled to. In the 1st division of the 18th ward, by a like mistake, they counted for the sitting member one less, and the contestant one more than each was entitled to. In the 3d division of the same ward, by a like mistake, one more vote was counted for the sitting member than he was entitled to. In the 4th and 6th divisions of the same ward, a like mistake was made of one vote in favor of contestant in each. In the 7th division of the same ward, by a like mistake, two votes *less* for sitting member and two *more* for contestant were counted than each were entitled to. In the 1st division of the 19th ward, by a like mistake, seven votes were counted for sitting member more than he was entitled to. In the 2d division of the same ward, by a like mistake, two votes for sitting member and one for contestant were counted more than each was entitled to. In the 4th division of the same ward, by the same mistake, three votes for sitting member and four for contestant were counted more than each was entitled to. And in the 11th division of the same ward, by a similar mistake, two for sitting member and one for contestant were counted more than was the true vote for each.

The whole claim of contestant may be stated in tabular form, as follows:

Eleventh Ward.

	Verree.	Kline.	Hamilton.
THIRD DIVISION:			
Official	151	141	2
Recount	141	148	4

Kline's gain, 17 votes

Sixteenth Ward.

	Verree.	Kline.	Hamilton
THIRD DIVISION:			
Official	182	166	6
Recount	166	180	6
Kline's gain, 30 votes.			
FOURTH DIVISION:			
Official	201	158	27
Recount	223	162	27
Verree's gain, 18 votes.			

Eighteenth Ward.

FIRST DIVISION:			
Official	236	121	9
Recount	237	120	9
Verree's gain, 2 votes.			
THIRD DIVISION:			
Official	214	150	10
Recount	213	150	10
Kline's gain, 1 vote.			
FOURTH DIVISION:			
Official	231	136	8
Recount	231	135	11
Verree's gain, 1 vote.			
SIXTH DIVISION:			
Official	286	134	8
Recount	286	133	8
Verree's gain, 1 vote.			
SEVENTH DIVISION:			
Official	271	187	15
Recount	273	185	15
Verree's gain, 4 votes.			

Nineteenth Ward.

FIRST DIVISION:			
Official	321	222	4
Recount	314	222	4
Kline's gain, 7 votes.			
SECOND DIVISION:			
Official	201	201	4
Recount	199	200	4
Kline's gain, 1 vote.			
FOURTH DIVISION:			
Official	311	251	0
Recount	308	247	0
Verree's gain, 1 vote.			
ELEVENTH DIVISION:			
Official	210	166	6
Recount	208	165	6
Kline's gain, 1 vote.			

Recapitulation.

	Verree's gains.	Kline's gains.	
Eleventh ward	..	17	
Sixteenth ward	..	12	
Nineteenth ward	..	8	
		—	37
Eighteenth ward	7		
Verree's returned majority was	22, making	..	29
			—
Kline's actual majority as claimed			8
			=

In support and denial of this allegation, as thus reduced to form, proof was adduced on the one side and the other before the committee, and able arguments of counsel submitted for their consideration. The evidence may be found in Mis. Doc. of last session, No. —, and of this session, No. 27.

The law of Pennsylvania contained at the time of this election a peculiar provision for the preservation of the ballot-boxes after any election, and the use to be made of them afterwards. It may be found in Purdon's Digest, section 55, page 287, and is as follows:

"As soon as the election shall be finished, the *tickets*, list of taxables, one of the lists of voters, the tally papers, and one of the certificates of the oath or affirmation taken and subscribed by the inspectors, judges, and clerks, shall all be carefully collected and deposited in one or more of the ballot-boxes, and such box or boxes, being closely bound round with tape, shall be sealed by the inspectors and the judge of the election, and, together with the remaining ballot-boxes, shall, within one day thereafter, be delivered, by one of the inspectors, to the nearest justice of the peace, who shall keep such boxes containing the tickets and other documents to answer the call of any person or tribunal authorized to try the merits of such elections."

This allegation embraces the recount of twelve ballot-boxes, yet no change of result could be obtained without that produced by the recount of the ballot-boxes in the three following divisions, viz: the third division of the eleventh ward, the third division of the sixteenth ward, and the first division of the nineteenth ward. In these three divisions it is claimed that there were mistakes in the original count against the contestant amounting in the aggregate to fifty-four votes. The attention of the committee was accordingly directed by both parties especially to these divisions. The claim of the contestant that the vote returned for members of Congress from these three divisions should be corrected to conform to the number of votes found in the ballot-boxes recounted, as of those divisions involves the settling of two other preliminary questions. Were the ballot-boxes produced the ones actually used at these precincts at the election contested? And did they contain untouched the ballots so cast? Indeed, it must be apparent to every one that unless the committee could be satisfied of both identity and security they could not control and correct the sworn return by any subsequent count.

Upon the question of *identity* the committee have had little or no difficulty. It was testified in respect to each of the boxes under consideration by the alderman of the ward, who resided nearest the precinct, that he received the box from the election officers of that precinct on the night of the election as and for the ballot-box used at that precinct, and each was so labelled when received. There was other evidence tending to strengthen this. And the committee were left without doubt that the boxes produced were those actually used at these precincts.

Upon the question of *security*, whether these ballot-boxes, when opened and recounted before the magistrates, were in the same condition as when sealed up by the election officers and delivered to the alderman on the night of the election, there was much conflicting testimony and much doubt.

THIRD DIVISION ELEVENTH WARD.

The box of this division was received by Alderman Williams on the night of the election, and placed by him in the vestibule of his office, over the door, upon a shelf with the other boxes, so high up as to require the use of a chair to reach it. There he thinks it remained undisturbed till the 8th of January—the day it was taken to the magistrate's office to be opened, a period of three months. He took it himself, with other boxes, on that day to the office of the magistrate for that purpose, having the assistance of one Samuel L. McKinney, the constable of the ward, in carrying and bringing back the boxes. The box was not opened on that day as was expected, and was taken again to the office in like manner and for a like purpose on the next day. Yet, although Alderman Williams believed the box when opened to be in the same condition as when it was received by him—the office where it was deposited was a place of frequent resort, especially by the constable McKinney, and by another alderman; and McKinney testifies that, on the day before the box was taken the first time from the office to the magistrate to be opened, in the absence of Alderman Williams, a person, a stranger to him, came to the office, representing to him that he had come after this box to take to the magistrate; that, believing his story, he helped him get it from the vestibule and take it away; that it was carried away in a basket, covered up with a cloth and kept from 10 till 3 o'clock in the afternoon, when it was returned by the same man who took it, and that Alderman Williams did not return to his office till 7 o'clock in the evening, and then not entirely sober. The character of McKinney was attacked, and it appeared that he had been convicted of "extortion," or obtaining money by fraud, and had been pardoned by the governor and since elected constable of the ward. Alderman Williams testified that he would not believe him under oath. If his character is as bad as claimed by the contestant, the committee believe him to be a very unsafe person to keep the company of ballot-boxes for three months, or be intrusted with them, as he was by Alderman Williams, to carry to the magistrate's office, and would be a very suitable person to do or connive at the very thing he testifies was done.

The committee could, however, place no confidence in the integrity of a ballot-box which had been in such company and keeping for three months, and when opened was found not to agree with the sworn returns received at the time of the election. By this recount the contestant gained seventeen votes. As the entire recount gives him but eight majority, it is obvious that, without this correction, the result cannot be changed. The committee think it would be most unsafe to contest the returns by such testimony.

THIRD DIVISION, SIXTEENTH WARD.

This box was received on the night of the election by Alderman Mecke, of the sixteenth ward, and by him kept under the desk in his office till the 6th of December following, when it was removed by him with the boxes to his new house, and placed with them in a boarded cellar till the examination before the magistrate of the 25th January following. This alderman was one of the magistrates who took the testimony for the contestant, and when his own deposition was taken, another magistrate was substituted in his place. The box was brought by him to the magistrate's office two days before it was opened, and left there by Alderman Mecke in an unfastened closet in charge of no one.

There it remained from Thursday until Saturday, when it was opened. Alderman Mecke, previously to the opening of the box, became very much alarmed and impressed with the idea that it had been tampered with, though he could assign no very definite reason for his suspicions. His testimony on this point was, "I believe the condition of the box has been changed; it has been tampered with." He at first believed that the wax with which it was sealed was too fresh in appearance, and went into the cellar to examine the wax upon the other boxes to satisfy himself upon this point. While there Alderman Remick, in whose office the box had been left by him from Thursday till Saturday, came into the cellar, and Alderman Mecke spoke to him of his uneasiness, as follows:

I believe I told him that I was unnerved. I had not slept for two nights, and I was fairly trembling then, which was shown by the fluid lamp which I held in my hand.

Question. Did Alderman Remick make any reply in the presence of Mr. Verree? If so, state what it was. Give, as nearly as you can, his own words.

[Question objected to.]

Answer. I believe he laughed at me, and said I was a damned fool; that is as near as I can recollect.

The opening and recount of this ballot-box is described in detail on pages 90 and 91 of Mis Doc. 6 of the last session. The full tickets were found in bundles of ten twisted together, and the scratched or broken tickets were found by themselves in bundles. Exact copies of the tally-lists used at this division were before the committee, and the full bundles of tens were found to coincide with the XX's, indicating tens on the tally-lists, and the scratched tickets found in bundles by themselves corresponded with the tallies for odd tickets on the tally-list, and altogether agreed with the original return. But on opening the twisted bundles which had been counted as full tens for the sitting member, there were found in those bundles "stickers" for contestant upon the tickets over the name of the sitting member, sometimes one, sometimes two, and sometimes three in a bundle. And the claim of the contestant was that by *mistake* these ballots with "stickers" had been counted as full ballots, the "stickers" being overlooked. This ballot-box was produced before the committee, the bundles of ballots having, at the request of the sitting member, been by the magistrates restored to it and the box sealed up again, and forwarded to the Clerk of the House. On breaking the seal and opening the bundles of tens, the committee found the "stickers" to be of yellow paper upon a white ballot, making a most striking contrast, visible as far as the ballot could be seen. No one but a blind man could make the mistake of overlooking these "stickers," for none other could fail to see them. There were other peculiarities noticed by the committee upon taking out from the bundles the ballots found in them with "stickers" upon them. In very many instances the "sticker" was a smooth piece of paper pasted over a fold in the ballot, with no corresponding fold in the "sticker," showing that the "sticker" had been placed upon the ballot at some time *after* it had been folded. So in some instances the twist in the ballot caused by twisting it in the bundle was not discoverable on the "sticker" which had been pasted on its face.

With all the proof before them touching this ballot-box, that it had been out of the custody of the law, in an unfastened closet, for two days, just before it was opened, when temptation was the strongest to tamper with it, the strange conduct of the alderman who had it in custody, his own conviction and assertion that it had been tampered with, the cool, comforting assurance of the other alderman in whose office it had been so carelessly left, and the condition of the ballots themselves when opened, the committee could not give to a recount thus made the effect of controlling the tally-list and sworn return made at the time, especially so when it is claimed, as in this instance, that a *mistake* of thirty votes was made in counting three hundred and fifty-four, by innocently overlooking yellow pasters on white ballots.

FIRST DIVISION, NINETEENTH WARD.

The ballot-box in this division was received from the inspectors on the night of the election by Alderman Stuart Field, and by him kept till produced before the magistrates opened, on the 21st day of January following. When the box was produced it was not found to be closed tightly, but it was so imperfectly tied with the tape that, at that time, the lid could be opened the space of three-eighths of an inch—wide enough to introduce single ballots; but whether bundles of tens could be introduced, the alderman himself had some doubt. Loose ballots were plainly visible through the aperture, which was large enough not only to insert but to abstract ballots. When the box was opened, a quantity of single tickets was found loose in the box, next to the opening, some for sitting member, some for contestant, and others for other individuals. The judge of the election testified that the scratched tickets were put back into the box loosely, after the bundles of tens had been placed in the box; but one of the inspectors testified that the scratched tickets were twisted together and laid on top, adding, "I helped do it myself."

It is apparent that this box had never been sealed according to law, or had been subsequently tampered with, and in either event no recount of it in the condition found before the magistrate could be taken as against the return made on the night of the election. But as the contestant gained but seven votes by a recount of this box, without the aid of the recounts of the third division of the eleventh ward, and the third division of the sixteenth ward, by which forty-seven votes were gained to contestant, and which have been already rejected, the recount of this division, if allowed, would be of no avail to him, and becomes, therefore, comparatively unimportant.

The committee are therefore unanimously of opinion, that, according to the contestant, all the corrections claimed by him in the other divisions, he is nevertheless not entitled to the fifty-four votes claimed by him to have been by mistake omitted from his count in the third division of the eleventh, the third division of the sixteenth, and the first division of the nineteenth wards, and is consequently not elected. They therefore recommend the adoption of the following resolutions:

Resolved, That John Kline is not entitled to a seat in this house as a representative in the 37th Congress from the third congressional district in Pennsylvania.

Resolved, That John P. Verree is entitled to the seat now occupied by him as a representative in the 37th Congress from the third congressional district in Pennsylvania.

The debate in the House was brief, and had reference principally to disputed facts rather than legal principles. The subjoined extracts are taken from it:

Mr. DAWES. * * * * I suppose the House will recollect, from the discussion which was had in the case of the contestant, Butler, from the first congressional district of Pennsylvania, precisely what the law is in reference to the preparation and counting of these ballots, the returns to be made, and the preservation of the ballot-boxes. There are judges and other officers appointed to attend upon elections, to count the ballots in the manner prescribed by the statute, and to make a sworn return upon the night of the election, and that is to be taken on the Friday following to a board of officers composed of the return judges, and they are to certify the result of the polls of the district to the governor, and the governor is to issue his proclamation. All this was done in this case. But it is claimed that, as to twelve of these districts, there was carelessness or mistake in the count on the night of the election, and that the returns so made were false in fact. There is no allegation and no claim that they were intentionally false on the part of the return judges. It is the duty of these judges, after having so counted the votes, to put them all back in the same ballot-boxes, tying up the ballot-boxes in a particular manner with tape, to put a seal upon it, and carry it to the magistrate residing nearest to the precinct, and it is his duty to keep the ballot-box. There is no provision of law as to how long he shall keep it, or in what particular manner; but it is to be kept for the purpose of being subject to be opened by any tribunal authorized to examine into the election.

These ballot-boxes were all so returned. There was in this case no difficulty in the mind of the committee as to identifying the ballot-boxes of these twelve divisions. On that point

each of the aldermen who received the ballot-boxes testifies to the fact that the particular ballot-box was the one that it claimed to be. In all of these cases about which there was contest in this election, the boxes were labelled when received.

The election was held on the second Tuesday of October, 1860. This contest was commenced immediately on the governor's giving his certificate of election to the sitting member. The notice of contest was then served by the contestant, and an answer was made in due season by the sitting member. Testimony was taken on the part of both contestant and sitting member, but the ballot-boxes were not approached until the 8th of January following. From the 8th to the 26th all these ballot-boxes were opened in the presence of the magistrates taking the testimony. They were therefore in the custody of the magistrates from the second Tuesday in October until about the second Tuesday in January—a period of three months. They were therefore in the custody of the law, although the law itself provided very inadequately for their security, and has since seen its defect and remedied it by additional legislation.

In a former case of contested election in this house, a majority of the committee were of opinion that the ballot-boxes, being in the custody of the law, being kept as prescribed in the law, although insecure, were to be presumed, in the absence of testimony that they were tampered with, as having been kept safely, and were of opinion that these boxes should be recounted. It was in the absence of any direct testimony that the majority of the committee came to that conclusion. However, the House differed with that majority, and established what the committee might have treated as a precedent; that is, that if the boxes were kept in an insecure place, although it was the place prescribed by law, it was not safe, even if there was no testimony as to their being tampered with, to allow a recount of them to control the sworn return made on the night of the election. The committee might well consider itself bound by that precedent. It was a conclusion which had great force upon its judgment.

But the case is not that. This case has all the elements of that case, and something more. The ballot-boxes were in that case, as in this, in the custody of the law for a period of three or more months. They were in just such a custody; in a custody which the committee felt, in this case as in the other, to have been insecure; in a place where they were exposed, and where there might have been tampering with them. I do not say that the committee would have reversed its decision if that were all. But, touching three of these boxes, there was positive testimony which shook all faith that the committee might otherwise have had in the integrity of the boxes, and especially when arrayed against sworn returns. The committee did not feel at liberty to control the returns by these boxes. Conceding to the contestant all of the recount which he has obtained, he is elected by only a majority of eight. In three of these boxes he has claimed to have gained fifty-four votes. It would be necessary for him to avail himself of these three boxes entirely in order to change the result. Accordingly both the sitting member and contestant directed the attention of the committee especially to these three boxes; the contestant to what he claimed to be evidence of the security of these boxes, and the sitting member to what he claims to be proof that the boxes had been tampered with. I propose simply to call the attention of the House to these three boxes, and then, on the conclusions which the House shall feel bound to come to touching them, will be decided the whole case.

Mr. JOHNSON. In the case of Butler *vs.* Lehman, decided at the present session, the gains shown were large gains—some two hundred votes; and I am free to say that where there have been opportunities to perpetrate frauds upon the ballot-boxes, and, upon a re-examination and recount, the gains are large and altogether upon one side, and that upon the side of the parties who have had the custody of the boxes, it is a suspicious circumstance, to say the least of it; but that is not this case. Here the gains and losses are trifling and alternate. The large gains are made by a single transposition of the figures, as I have stated.

Now, sir, the committee seek to overthrow these ballots by showing that their custody has not been such as to entitle them to that respect which the legislature of Pennsylvania intended to be given to them when they provided that they should be deposited with the aldermen and justices of the peace, and kept sealed up by them in their offices for further purposes of investigation and counting. They say they have no doubt that the boxes opened and counted were the identical boxes deposited with the aldermen, but they have doubts whether the custody of the boxes was such as completely to preclude the possibility of their being tampered with; and, strange to say, they have thrown doubt upon the ballot-boxes, because the contestant has not been able to prove a negative, to wit: that from the time the boxes were left in the offices of the aldermen up to the time when they were opened and examined they had not been tampered with. They say:

"Upon the question of *security*, whether these ballot-boxes, when opened and recounted before the magistrates, were in the same condition as when sealed up by the election officers and delivered to the aldermen on the night of the election, there was much conflicting testimony and much doubt."

Now, sir, the law of Pennsylvania is, that every intendment must be made in favor of the faithful discharge by every officer of his official duty, and it is not a mere matter of presumption. We have no right to say that we fear he has not done his duty, and therefore we will disregard his acts. The law of Pennsylvania gives to every man intrusted with official

duties the presumption of law that he discharges his duty faithfully; but here a presumption is set up against the aldermen—not against any one alderman in particular, but against the whole community—that because, forsooth, there is a majority for John Kline of eight votes, out of some eighteen thousand cast at the election, somebody must have tampered with the ballot-boxes; that some fraud must have been perpetrated—a presumption that the parties have been guilty of a crime which, by the act of the legislature of Pennsylvania, sends them to the penitentiary for not less than a year.

The House adopted the resolutions reported by the committee, March 4, 1862—yeas 105, nays 13.

NOTE.—The debate in this case is reported in volume 47 Congressional Globe. For the report: Mr. Dawes, page 1054; Mr. Kelley, page 1061. Against the report: Mr. Johnson, page 1056; Mr. Wright, page 1058.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

BEACH, *of Virginia.*

A State legislature and a constitutional convention being in existence at the same time, the convention cannot assume legislative functions in the presence of the legislature and fix the time and place for a congressional election.

The provisions of the law of Virginia not having been complied with, and a majority of the voters in the district having had no opportunity to participate in the election, it was treated as a nullity.

IN THE HOUSE OF REPRESENTATIVES,

MARCH 3, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

That they have had the subject-matter of said memorial under consideration, and find the following facts: This district is composed of the counties of Spottsylvania, Alexandria, Fairfax, Fauquier, Prince William, Rappahannock, Culpeper, Stafford, and King George, and the election, under which Mr. Beach claims the seat, was held on the 24th of October last, in pursuance of a proclamation of Governor Pierpoint of October 12, 1861. The memorial may be found in Mis. Doc. No. 26, of the present session, and the following is a copy of the credentials of the memorialist:

The undersigned, conductor and commissioners of election, having been duly appointed and sworn, do hereby certify that they acted as such conductor and commissioners of election; that said election was held on the 24th day of October, 1861, at the court-house in Alexandria county, in the seventh congressional district of Virginia, pursuant to law, and that the following is a true statement of the vote as exhibited by the poll-book, viz: For member of Congress, Samuel Ferguson Beach received one hundred and thirty-eight votes, and Charles B. Shirley, for the same office, received eleven votes; and we further certify that there were no other polls of election held at any other precinct in said county of Alexandria, nor in any other of the counties of this congressional district, as far as we can learn and believe, and that all the other counties of this congressional district are and were, at the time of said election, included within the lines of the rebel army; and we, therefore, further certify that said Samuel Ferguson Beach was, by a majority of all the votes polled in this congressional district, duly elected a member of Congress of the United States.

Given under our hands this first day of November, 1861.

WALTER L. PENN,
Conductor.
JAMES VANSANT,
T. A. STOUTENBURGH,
Commissioners.

His Excellency FRANCIS H. PIERPOINT,
Governor of the State of Virginia

This election is based upon the same authority and was conducted in the same manner as that of Joseph Segar, who claimed a seat in this house as the representative from the first district in Virginia. The views and conclusions of the committee in that case having been submitted to the House, (Report No. 12 of the present session,) and received its sanction, form a precedent in this case, and will therefore be embodied in this report as far as applicable.

A convention assembled at Wheeling, in the State of Virginia, on the 11th of June last, in which were represented, it is believed, thirty-nine counties of the State, situate in what is known as Western Virginia. This convention adopted on the 19th of June "an ordinance for the reorganization of the State government," after having declared that, because of the treasonable practices and purposes of the State convention lately held in Richmond, and of the executive of the State in connexion therewith, "the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated." By the same ordinance a legislature, or general assembly, for the State of Virginia was created, and required to "assemble in the city of Wheeling on the first day of July, and proceed to organize themselves as prescribed by existing laws in their respective branches." Said convention subsequently elected a governor for the State of Virginia, who still holds the office thus conferred upon him.

The legislature thus created assembled as required, and passed many enactments for the whole State of Virginia, elected two United States senators, who were admitted to seats in the Senate, and assumed all the functions of the general assembly of Virginia under its pre-existing constitution and laws. The convention which created and set in motion this new government did not, however, dissolve itself upon the assumption of the several functions of government by the executive officers and general assembly which, in the exercise of provisional powers, it had itself brought into being, but continued to hold its meetings after the assembling of the legislature, and to share with it in ordinary legislation for the whole State. The legislature was in session till the 24th of July, and how much longer the committee are not informed. The convention was in session on the 20th of August, and on that day passed an ordinance providing for the election of representatives in Congress in each district where, from any cause, such election was not held on the fourth Thursday in May last, the day provided by law for such election, and also "in the eleventh district, where a vacancy now exists, an election for such representative shall be held on the fourth Tuesday in October next, which shall be conducted, and the result ascertained, declared, and certified in the manner directed in the second edition of the Code of Virginia." The governor thereupon, on the 12th day of October, issued the following proclamation:

THE COMMONWEALTH OF VIRGINIA.

EXECUTIVE DEPARTMENT,
Wheeling, October 12, 1861.

To the people of Virginia:

Whereas several of the congressional districts of this State are unrepresented in the House of Representatives in the Congress of the United States, by reason of failure to elect on the fourth Thursday in May last, caused by armed men in rebellion against the Constitution and laws of the United States and of this State; and it being the right of the loyal inhabitants in each district to be represented in said House by a representative of their own appointing, the convention of Virginia, on the 20th day of August, 1861, passed an ordinance directing an election to be held on the fourth Thursday in October instant, (24th,) in every district of the State so unrepresented and where vacancies exist. It is further made the law, by virtue of the ordinance aforesaid, that any person who is prevented from attending such election, by *reason of* the occupation of his own county by armed men in hostility to the government, *hat such* voter may vote anywhere in his congressional district. It is further ordained that

the election shall be conducted, and the result ascertained, declared, and certified, in the manner directed in the Code of Virginia of the edition of 1860. By the 11th section of chapter 7th of that code any two freeholders may hold an election directed by law at any place of voting, if no commissioner to superintend the same appears and is willing to act, or if no commissioners have been appointed to hold the election.

Now, therefore, in consideration of the premises, I, Francis H. Pierpoint, governor of the Commonwealth of Virginia, do hereby entreat the loyal voters of this State to hold elections in their several districts on the day above mentioned, to the end that the people may be represented, the principle of representative government sustained, and the State have her due weight in the national legislature.

F. H. PIERPOINT.

This proclamation applies in terms to districts unrepresented "by reason of failure to elect on the fourth Thursday of May last." There was, however, at the time this election was held, a gentleman, Hon. C. H. Upton, representing this district in the present Congress under an alleged election upon said fourth Thursday of May last. But as the House has since declared Mr. Upton not entitled to the seat, it may, with propriety, be held to come within the terms of the proclamation.

It is not claimed by the memorialist that any poll was opened at any other precinct or voting place in the whole district, except in the city of Alexandria; but he asserts that the ballot-box knows no quorum, and that the number of votes cast is not a legitimate inquiry beyond the necessity of ascertaining for whom a majority was given. If the votes are cast according to law, and legal votes, then it matters not whether they be few or many. The committee have been led to apply the rule, thus set up by the claimant, as the only test. Were the votes cast at this election so cast in conformity to the existing laws of the State of Virginia?

The whole authority for this election is the ordinance of the Wheeling convention passed August 20. Assuming that the proceedings of that convention, and of the legislature and executive created by it, have ripened into a State government, legal in all respects, still the question arises, was it one of the functions of that convention to provide for the time, place, and manner of electing representatives in Congress, especially after the legislature had assembled? The purpose of that convention was the creation of a new State government. The only basis upon which it rests is necessity.

A new government must begin somewhere, and there must be somebody to make it. As necessity was the foundation, so also it was the limit of the power called into being for the sole purpose of inaugurating a new government. It could do anything necessary to carry out that purpose, and when that was done it could do no more. Its functions ceased the moment the new government took on form and life. The two cannot, in the nature of things, exist and move *pari passu*. Now, long before this ordinance had passed the convention, there was in existence a governor and a legislature, having all the powers that a governor and legislature could have in Virginia—that is, all the powers which the constitution of Virginia clothes a governor and legislature with, not in conflict with the Constitution of the United States.

Now, this latter instrument provides (art. 1, sec. 4) that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the *legislatures thereof*." It is a legislative act. It is a *law*. If the time had been fixed in the constitution of the State, recognized and acquiesced in by the legislature, it may be said to be the act of the law-making power—a legislative act. But this time and manner were not fixed in the organic act, nor by the legislature, but by the convention assuming legislative functions in the presence of the legislature itself.

Again: the ordinance itself proposes to conform this election to the code of Virginia. It "shall be conducted, and the result ascertained, declared, and certified in the manner directed in the second edition of the Code of Virginia."

Has the election under consideration been conducted in all respects according to the requirements of the Virginia code? Title 3, chapter 7, section 14 of that code provides for elections to fill vacancies in Congress, and enacts that they "shall be superintended and held by the same officers, under the same penalties, and subject to the same regulations as are prescribed for the general elections." Section 16 of the same chapter provides that "a *writ* of election shall be directed to the sheriff or sergeant of the county or corporation for which the election is to be held; or if the election is to be held for an election district, or to fill a vacancy in the senate or in Congress, to the several sheriffs and sergeants of the counties and corporations which, or any parts of which, are included in the district. It shall prescribe the day of election, (to be the same throughout the district,) and may fix a day on which the officers conducting the election are to meet to make returns, not later than that fixed by law in the case of a regular election."

Now in the present case there is nothing which answers to a *writ of election*. The only paper originating this election is the proclamation of the governor of October 12, already copied into this report. This proclamation can be considered in no sense a writ of election. It commands nobody—no authorized officer to hold an election. It only "entreats the loyal voters" to hold an election, and is addressed not "to sheriffs," &c., but "to the people of Virginia." This is no technical defect. The 17th section of the same chapter of the Code provides something for the several officers to whom the writ is directed to do before the election can be held. That section is in these words:

> Each officer to whom a writ of election is directed shall at least ten days before such election give notice thereof, and of the time of the election, by advertisement at each place of voting in his county or corporation.

The reason of this enactment is manifest. The law, which all are presumed to know, fixes the time of a general election, but does not fix the time of holding a special election. It is done by the governor in his "writ of election," directed to the sheriff. This provision of law is necessary to insure notoriety, and it is made the duty of the sheriff, to whom the writ is directed, to do it in a particular manner. Now, this proclamation, if a writ, is directed to no sheriff. It commands nobody to give the notice or to open the polls required by law. It only "entreats the loyal voters of this State to hold elections in their several districts on the day above mentioned."

Not only was there no poll opened in any precinct in the district, except in the city of Alexandria, but no notice of this election was ever given, by advertisement or otherwise, at any other precinct. Indeed, all attempt at giving notice or opening a poll at any other precinct was an impossibility. The whole district was in the possession of armed men, with the exception of the city of Alexandria and a very small portion of the district in the immediate vicinity of the Potomac. All the rest of the district was in the armed occupation of the rebels, and all lawful authority subverted. To advertise or open a poll would have surely secured an arrest for treason by the rebels, and an attempt to cast a vote would have incurred the same penalty. That small portion of the district not in possession of the rebels at that time was occupied by our own troops and subject to the law of the camp alone. Outside of the city of Alexandria there was not a single officer of the law to discharge any of the functions of his office. There was, then, a total failure to comply with these essential provisions of the law of Virginia. The same Code requires (title 3, chapter 8, section 3) the officers conducting this election to meet at the court-house, in the county of Alexandria, on the *fifteenth* day thereafter, to compare the returns and declare elected the person having the greatest number of votes in the whole district. This has never been done, and of what was done in the whole district the committee have no *official* evidence, and only know there were no other votes by knowing that voting *elsewhere* was an impossibility. By the eleventh section of the same chapter

return is to be made to the governor, and he is to make proclamation of the person elected within sixty days. There has been no such proclamation in this case.

It is apparent, from what has been already said, that if the claim of the memorialist rests exclusively upon a strict conformity with all the provisions of law, it cannot be maintained.

But the committee do not desire to rest their conclusions upon so narrow a basis. If the Union voters of the district had had an opportunity to choose a representative—if there had been no armed occupation of the district by rebels, so that polls could have been opened at the various voting places in the district, and all who desired could have deposited their ballots, and had done so in conformity with the provisions of law, so far as the disturbed and abnormal condition of things would permit, the committee would have sought some way to give effect to such election. But enough of the facts surrounding this election have already been stated to show that such is not the case. There was but one single poll in the whole district opened, and but one hundred and forty-nine votes cast. The reason why there were no other polls opened or more votes cast cannot be better expressed than by the three freeholders themselves who certify to this election. This is their language:

> And we further certify that there were no other polls of election held at any other precinct in said county of Alexandria, nor in any other of the counties of this congressional district, as far as we can learn and believe; and that all the other counties of this congressional district are, and were at the time of said election, included within the lines of the rebel army.

This state of things is no fault of the memorialist or the Union voters of the district; but it did exist on the day of this election. How can it be made to appear, then, that the memorialist is the choice of the district, or that if an opportunity had existed an overwhelming majority of votes would not have been cast against him? In what sense can it be said that those who did not vote are to be presumed to acquiesce, when they neither had the opportunity to vote, nor the knowledge that voting was going on? Acquiescence presumes liberty to protest. In this instance that liberty did not exist.

In conclusion, the committee are, for the foregoing reasons, of opinion that the memorialist was not, by virtue of the votes cast for him in the city of Alexandria on the 24th of October last, elected a representative to this Congress from the seventh district in Virginia, and they accordingly recommend the adoption of the following resolution:

> *Resolved*, That S. Ferguson Beach is not entitled to a seat in this house as a representative in the 37th Congress from the seventh congressional district in Virginia.

Agreed to without debate or division.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

BYINGTON *vs.* VANDEVER, *of Iowa.*

Where a member of Congress entered the military service of the government as a colonel of volunteers, held by the committee that he was not entitled to a seat in the House after he was mustered into the service.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 11, 1862.

Mr. G. H. BROWNE, from the Committee of Elections, made the following report:

Mr. Vandever claimed to be a member of this Congress by virtue of an election held in his district *on the day of the presidential election* A. D. 1860, and *was admitted under that claim.*

It was contended, however, that *the day of the presidential election A. D.* 1860 was not the day prescribed by the laws of Iowa for the election of members of Congress, and that, therefore, Mr. Vandever's election was void.

The law of Iowa, section 239, page 43, of the Code of 1851, provides that members of Congress shall be chosen at a "general election;" and section 237, page 42, defines a "general election" to be that at which the members of the general assembly are regularly chosen; and the constitution of Iowa of A. D. 1858 provides that members of the general assembly shall be chosen on the day of the presidential election in the years when there is one, and that they hold their office for two years. These provisions, in the opinion of your committee, fix the days of presidential election as a legal time for the election of members of Congress in Iowa, and hence they are of the opinion that Mr. Vandever was duly elected and rightfully admitted to a seat in this Congress as a representative from the second district of Iowa.

But after that election Mr. Vandever made to the President an offer to furnish from the second congressional district of Iowa a regiment of volunteer infantry for the service of the country during the war, which offer the President, on the 23d day of July, A. D. 1861, by virtue of the act "To authorize the employment of volunteers to aid in enforcing the laws and protecting public property," accepted, and directed Mr. Vandever to have his proposed regiment ready for marching orders as soon as practicable. Mr. Vandever, with a patriotism worthy of all praise, proceeded to enlist and "have ready for marching orders" the force he had tendered, (acting under directions of the War Department,) and on the 30th day of August, A. D. 1861, was appointed colonel of the ninth regiment Iowa volunteer infantry, and on the 24th day of the following September was mustered into and has ever since been in the actual service of the United States, receiving the pay belonging to his rank, and subject, of course, to the commands of his superior officers.

A commission, a copy whereof is herewith submitted, was issued to him by the governor of Iowa. In terms it commissions him as colonel of the ninth infantry regiment of the militia of Iowa. The committee are not aware that any other formal military commission ever issued to Colonel Vandever, either from the President or from the governor of Iowa. The letters of the adjutant general of Iowa, (House Mis. Doc No. 16, page 1,) and from Colonel Vandever to the committee, as well as all the other established facts of the case, however, show conclusively that Mr. Vandever was really appointed and is actually serving as colonel of the ninth regiment Iowa volunteer infantry, and that the commission is inaccurate in the use of the term militia.

Colonel Vandever, under the facts, claims, however, that he is simply an officer of the State of Iowa, b cause, (as his letter would seem to imply,) in his opinion, the volunteer force he enlisted and commands is simply a part of the militia of Iowa.

But whether Colonel Vandever is to be regarded as an officer in the army proper of the United States, or as an officer of the militia of Iowa, is, in the opinion of the committee, of little importance. If he was actually mustered into the service of the United States, he was, by that act, placed in an office totally incompatible with that of representative in Congress.

He has no right as representative to absent himself from the House without leave; and if he does, is liable to be arrested by the officer of the House, and returned and punished. But he is also bound as an officer of the army to be with his regiment, (perhaps a thousand miles distant,) ready to execute the commands of his superior officer; and for his default, is liable to punishment—it may be with death. Or his military superior may take him by force from his seat and duties in the House to his post in the army.

That such a physical impossibility as is thus created, to execute the duties of both offices, renders them incompatible, would seem to be beyond a doubt.

But there is also that in the nature of the powers incident to the two positions which renders them incompatible. As representative he may by his vote repeal the law or army regulation creating a duty or imposing a penalty which, as officer of the army, he has neglected or incurred. Or in the exercise of his right, (and perhaps duty,) as representative, to speak of the conduct of his superior military officers, he might utter words for which, as an officer of the army, the superior would have an equal right to cause him to be tried by court-martial and punished.

These instances of conflicting irreconcilable duties and powers are sufficient to illustrate the incompatibility of the two offices; and that the acceptance by the same person of an office incompatible with another held by him, is a virtual resignation or forfeiture of the office first held, is too plain a proposition to need illustration. It results from the presumption that no man can intend, as well as from the policy that no man shall be permitted, to hold a trust the duties of which he has disqualified himself from performing. All the authorities agree in this principle.

And again admitting, for the sake of the argument, that Colonel Vandever was originally simply an officer of the militia of Iowa, still your committee are of the opinion that *the act of mustering him into the military service of the United States* made him an officer of the United States. The authority which an officer is bound to obey and to which he is responsible, and whose pay he receives, determines under what government he acts, and whose officer he really is.

But your committee are of the opinion that Colonel Vandever was really and truly appointed colonel, not of Iowa militia, but of the ninth regiment of Iowa volunteer infantry, and that the latter force is in no sense of the term a militia force, but is a force raised solely by the authority of the federal government, and hence that its officers (Colonel Vandever among the rest) hold their offices under the United States.

The commission, it is true, styles him colonel of the ninth infantry of the militia of the State of Iowa. But a commission does not confer the office. It is, at most, but evidence of an appointment. An error in the commission cannot confer a right to an office to which the person holding the commission has not been appointed, neither can it take away his right to exercise the powers and receive the emoluments of one to which he has been appointed. There are numerous officers which the President commissions that are appointed by others. Suppose there should be an error in the commission he confers: certainly it would not take away the office. The appointment itself, and the entrance upon and actual discharge of the duties of an office (by the appointee,) under a claim of right, are the real requisites constituting a person an officer, and decisive of the office to which he is appointed.

Neither does the fact that he was commissioned by the governor of Iowa militate against the position that Colonel Vandever is an officer of the United States. The act of Congress under which the force Colonel Vandever commands was raised authorizes the governors of the States where the force is raised to commission certain of the officers. The governor acts only by virtue of that law. He is the mere agent of the United States for the purposes indicated in the act. The appointment and commission would have been just as valid had any other agent been selected to have made and issued them.

But the force Colonel Vandever really was appointed to command, and with which he has ever since been in service as commander, was *enlisted* by direction of the President under the authority of the act of Congress entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," which act could have been passed only under that clause of the eighth section of the Constitution which provides that Congress shall have power to *raise* and support armies. It was not *enro'led* by the

State authorities, and then drafted by virtue of the subsequent clause of the section above cited, which authorizes Congress to provide for organizing, arming, and disciplining the militia. Under this latter clause there is no power to raise forces, but only to organize and arm and discipline those raised or enrolled by the States. If it had been raised under the latter clause the governor of Iowa would have had the sole undoubted right, under the Constitution, to have commissioned and appointed *all* its officers; whereas his only authority now accrues to him from the act itself, and is limited to colonels and officers of inferior rank. These considerations seem decisive of the character of this volunteer force, viz: that it is not a militia force, but a part of the army proper of the federal government.

That it was this volunteer force that Colonel Vandever was really appointed to command appears from the letter of the chief clerk of the War Department to the Hon. Wm. Vandever, (House Mis. Doc. No. 40, p. 3;) the letter of the adjutant general of Iowa, (House Mis. Doc. No. 16, p. 1;) Colonel Vandever's letter to the committee, hereto annexed; the letter of the paymaster general of the United States, (House Mis. Doc. No. 40, p. 6;) and every other well-established fact in the case. That he accepted said office, and has since been in the actual service of the United States, receiving his pay as colonel of the ninth regiment of Iowa volunteer infantry, is beyond a doubt; indeed, his own letters to the committee so declare.

The committee are, therefore, clearly of the opinion that in whatever light Colonel Vandever is regarded, whether as an officer of the militia of Iowa, actually mustered into the service of the United States, or as an officer of the army proper of the United States, his position is not only incompatible with that of representative in Congress, but also that his case falls clearly within the last clause of the 6th section of art. 1 of the Constitution of the United States, which provides that no person holding an office under the United States shall be a member of either house (of Congress) during his continuance in office.

If any decision of this house, construing so plain a provision of the Constitution, were necessary to support the opinion which the committee have reluctantly felt themselves compelled to adopt, they submit that it is found in the cases of John P. Van Ness, reported in Contested Elections, p. 122, and of Colonel Yell, in the 2d session of the 29th Congress.—(See vol. 17 Congressional Globe and Appendix, p. 341.) The case of Colonel Yell is believed to be perfectly decisive of the question now presented to the House.

The loyalty, patriotism, and valor which prompted Colonel Vandever to leave the comparative ease of this hall and take upon himself the labors, vexations, hardships, and dangers of the recruiting service, the camp, and the battle-field, impressed the committee with the warmest admiration of his character, and excited in them a strong desire to find some valid reason for reporting in favor of his retaining his seat. This they have been unable to do; and the great importance of the principles which govern the case, as well as the *quasi* judicial character imposed in these investigations upon the committee, forbid them to allow prepossessions or favor to affect their decision.

That no member of this house shall be allowed to hold, at the same time, an incompatible office, and that no other department of this government shall be allowed to exercise any influence over its members, by distinctions and emoluments conferred, or any control by virtue of superior authority, are principles that involve the existence, integrity, and rights of the House, and the just distribution of the powers of the government. They were deemed of such vital importance as to demand a place as an express provision of the Constitution, inserted after the fullest debate and consideration.

In view of the necessity of maintaining these principles in their full extent, the committee could not allow any extraneous circumstances to influence them. However much they might honor Colonel Vandever for his noble conduct, they

must judge his rights by the same law that is applicable to the most undeserving member of the House. They have therefore felt compelled to report and ask the House to adopt the following resolution:

Resolved, That William Vandever has not been entitled to a seat as a member of this house since he was mustered into the military service of the United States as colonel of the ninth regiment of Iowa volunteer infantry, to wit, since the 24th day of September, A. D. 1861.

The debate in the House was confined principally to a statement of the case by Mr. DAWES, of the Committee of Elections, extracts from which follow:

The resolution, reported unanimously by the Committee of Elections, declares that William Vandever vacated the seat which he held in this house by accepting the position of colonel in the volunteer forces of the United States. The question presented by the committee is divided into two parts: the first is, whether the office which he accepted was in itself of such a nature as to be incompatible with the duties incumbent upon him as a member of this house? The second is, whether it be so or not, does not the Constitution of the United States require that he who holds a seat in this house, and accepts such an office as this, shall vacate it? In other words, is he not by the Constitution disqualified from holding a seat in this house by the acceptance of the office of colonel of the volunteer forces?

The question thus divides itself into two branches, and to these two I desire to call the attention of the House for a single moment, reciting simply so much of the report as finds that Mr. Vandever, after having been duly elected—which the committee find, although the question was raised whether he was ever elected—but, after having been duly elected to a seat here, tendered his services to the President of the United States under the law organizing a volunteer force for the suppression of the rebellion, and, accepting the position of colonel of the ninth regiment of Iowa volunteers, mustered into the service of the United States as such colonel, and has served up to this time in that capacity, having drawn his pay both as a colonel of Iowa volunteers in the United States service and as a member of this house. Now, are these two positions compatible with each other? Are the duties of a member of this house and the duties of an officer of the volunteer forces of the United States of such a character that they can both be discharged by one and the same person? It is very evident that they cannot be discharged at the same time by one and the same person, because they are to be discharged upon different theatres.

The duties of a representative are here in this hall: the duties of an officer are in the field; and, therefore, these duties cannot be discharged at the same time, because no man possesses the power of occupying two places at one and the same time. They are of such a character that they cannot be properly discharged, if at all, by the same person, because the representative upon the floor passes upon his own acts as an officer in the field. While in the military service, and under the command of the commander-in-chief, he cannot act independently here, for he may, by the order of his superior officer, be taken from his seat here at any moment; he may be ordered out of his seat here when he is upon the very point of casting his vote either upon the conduct of his superior officer, or upon the question of prescribing rules and duties and imposing obligations not only upon his superior officer but upon himself. He may be required, in the discharge of his duties as a representative here upon this floor, to pass upon the conduct of his superior officer, the commander-in-chief. He may arraign him here for impeachment, and he may be, according to the rules and articles of war, immediately arrested therefor and tried by court-martial and shot, if it may please the court-martial to so order. He may be called upon here to vote upon the longer continuance in force of rules and articles of war which he may himself have violated, and that, too, while he himself is being tried by court-martial for the very offence. He may come in here and vote to annul the very article of war under which he is being tried. He may come in here and vote to declare that to be no longer an offence against the articles of war which he himself has committed. The President of the United States may, as commander-in-chief, have measures which he is desirous of obtaining the sanction of law for, and he may order those who are under his command as his inferior officers to march into this hall and cast their votes for or against any measure, and if they violate his orders he may further order them to be court-martialled and to be tried for insubordination. Measures may be pending in this hall touching upon the manner in which the war is to be conducted. They may be pending by a very close vote, and that vote be determined by the very few men that are, even at this day, officers under him in the volunteer corps; and if need be, he may at any rate multiply those officers until he may command a majority under any and all circumstances in this house.

The very nature of the duties of a military man and the nature and duties of a member of this house are so incompatible that, by the rules of law, if there were no constitutional provisions whatever on the subject, it will appear beyond a doubt to every legal mind impossible for a man to discharge the duties of an officer of the volunteer corps of the United States and at the same time consistently discharge the duties of an independent representative of the people upon this floor. But, sir, the Constitution has not left us even to depend upon the established rules of law, under which any court having jurisdiction of such a case would

rule that by the acceptance of one office a man would necessarily vacate the other office, incompatible, as I have stated, previously held by him. The Constitution, however, expressly declares that—

"No person holding any office under the United States shall be a member of either house during his continuance in office."

Whatever may be the character of the office, whether it be of such a nature that its duties are incompatible or not, no person may hold the two offices.

The solicitude of the framers of the Constitution that every member occupying a seat here should be not only theoretically but practically and entirely independent of the executive, induced them not only to extend the rule to a matter of incompatibility in the duties of the two offices, but to prohibit absolutely any man holding an office under the United States to hold a seat in this body.

So that, whether we look at the nature of the office itself and the duties that follow upon its acceptance, or whether we look at the plain provisions of the Constitution of the United States, there does not seem to the committee a doubt as to how this case must be decided. The committee, appreciating as they do the patriotic motives which induced not only Colonel Vandever, but all others similarly situated in this house, to forego their positions here for the more arduous, difficult, and dangerous position in the field, were solicitous to find some way of escape from the conclusion to which they have arrived; but they have been utterly unable to arrive at any other conclusion. However reluctant they may have been in adopting the course they have felt themselves compelled to pursue, they do not see by what means they can escape from the result that Colonel Vandever, by accepting the office of colonel of volunteers, and being mustered into the service of the United States, vacated his seat in this house.

Mr. SHELLABARGER. I wish to ask this question of the chairman of the Committee of Elections. I agree with him in the substance of what he has said, and in the conclusion to which he has come; but I wish to know if Colonel Vandever was not, in fact, a member of this house duly elected, and that he afterwards accepted an office under the government of the United States? If that be the fact, I then wish to know whether this affects the vacation of his seat as a member of the House, or whether, on the other hand, the office that he subsequently took is one that he could not take, and that his commission to the second office is therefore void. The provision of the Constitution immediately preceding that quoted by the gentleman from Massachusetts seems to favor the latter construction:

"No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States."

Mr. DAWES. In reply to the gentleman I will state that which of the offices a man vacates when he accepts a second office, the duties of which are incompatible with those of the one he before held, whether we look into the provision of the Constitution or to the settled decisions of the courts, cannot, for a moment, be a matter of doubt. It has always been held in the courts of the United States, and, so far as I know, in the courts of the States, whenever the question has been raised, that by accepting an office the duties of which are incompatible with those of the office he before held, he necessarily vacates the first office. A case precisely in point is quoted in the very last Massachusetts reports; a similar case occurs in the Rhode Island reports; and like cases occur in those of other States, and they all are uniform upon this point. It could not well be otherwise. He is free to elect which of the offices he will discharge the duties of. Both being conferred upon him, he is at liberty to determine which he will accept; or, having accepted one, he is at liberty to resign it and accept the other. But being so at liberty, and the duties of the two, as I have said, being incompatible, the legal effect of accepting the second office is the election of that office and consequently the vacation of the other, whether by formal resignation or not. I believe the authorities are all clear and concurrent upon that point.

In accordance with that decision, I repeat, the moment a man holding a seat upon this floor as a member of the House accepts and enters upon the duties of another office, the duties of which are incompatible with those of a representative, that moment his seat as a member of this house becomes vacant, whether by formal resignation or not. The moment a member of this house accepts a commission in the military service of the United States, and qualifies under it, he is bound by the articles of war, and those articles of war are as incompatible with the exercise of the duties of a member here as slavery is incompatible with freedom. The articles of war are, and from their nature must be, to some extent, a tyrannical code that holds him to the strictest discipline. No one of the duties it imposes can be discharged while he sits in his seat and discharges the duties of a representative here.

Therefore, while the nature of the two offices was such as to impel the committee irresistibly to the conclusion to which they have come, the express provision of the Constitution held them there likewise. They also find that the precedents in point are clear and equally conclusive. There is no departure in the report we have submitted from the precedents. There are precedents as precisely like this as two cases can be like each other.

The House adopted the resolution without a division. The case, so far as the rights of the contestant, Mr. Byington, were affected, was brought up again.

February 5, 1863, the subjoined debate occurred in the House:

Mr. DAWES. Mr. Speaker, I rise to a question of privilege. After the action of the House a few days since on the resolution reported by the Committee of Elections in reference to the right of Mr. Vandever to a seat in this house, it became necessary for the Committee of Elections to report back the papers submitted by Mr. Byington, the contestant, and to ask to be discharged from their further consideration. I am instructed to make that report at such time as the House will consent to let Mr. Byington be heard on a point not presented to the House, and on which there has been no consideration in the House: that is, on the point whether Mr. Vandever ever was elected to this house. It was claimed by him, and was made the ground for contest to some extent, that Mr. Vandever never was elected to this house at all, and that therefore he had no right to a seat upon this floor. On that point, the committee not agreeing with him, when the case was submitted to the House I made no comment at all. It is customary in all cases to permit the contestant to be heard, if he desires it. At the time the case was up before the House the House did not seem to be in a temper to permit discussion to any great length; and it was owing to what I supposed to be the temper of the House at that time that I did not give him an opportunity to be heard.

Mr. BINGHAM. I ask the gentleman from Massachusetts whether the proceedings of the contest by Mr. Byington of the seat of Mr. Vandever in the thirty-seventh Congress were instituted under the law of Congress?

Mr. DAWES. I merely ask in behalf of the contestant that he may have the usual courtesy extended to him that has been extended to every contestant to argue that point. I will answer the inquiry of my friend from Ohio, [Mr. Bingham.] He asks whether this contest has been instituted by this contestant under the provisions of the statute of the United States. I answer that it has not, for a plain reason. This house has utterly refused, on one or two occasions, when the Committee of Elections attempted to hold it to the provisions of that statute; and the House has refused to hold the contestants to the provisions of that statute. In this particular case it was utterly impossible to conform to the provisions of that statute. The first is, that notice of contest shall be served thirty days after the certificate was granted to Mr. Vandever. This contestant was not in such a position as to give that notice for under a year.

Mr. BINGHAM. Why?

Mr. DAWES. For this reason: he does not claim that he was elected, but that nobody was elected when Mr. Vandever received this certificate, because, as the contestant claims, no election could be held during that year; but that it was properly held the next year, when he was elected. Therefore the law of Congress could not apply to the case.

I only ask that Mr. Byington shall be heard. I now make the report from the Committee of Elections, that it be discharged from the further consideration of the papers of the contestant in this case; and I ask that the contestant be heard by the House on this matter.

Mr. COX. I have a resolution that I think will bring the case before the House, so that Mr. Byington may be heard.

Mr. DAWES. Whatever may be the report on the case, I hope that the contestant will not be refused an opportunity to be heard. It has never before been done. Gentlemen need not be alarmed, for I do not propose to go into a general discussion of the case.

The SPEAKER. There is a rule of the House allowing contestants to be heard in their own cases.

Mr. DAWES. But this contestant has not had that courtesy extended to him.

Mr. LOVEJOY. How long does he want?

Mr. DAWES. Not very long.

Mr. STEVENS. I am willing to bring the subject before the House on the resolution of the gentleman from Ohio; but I ask that its consideration be postponed for three or four days, in order that we may finish the appropriation bills and send them to the Senate. It would be a convenience to the public business to postpone it.

Mr. DAWES. I do not propose to press it against the public business.

Mr. COX. I ask the gentleman to yield to me for the purpose of moving my resolution.

Mr. DAWES. I yield for that purpose.

Mr. COX. I offer the following resolution:

Resolved, That William Vandever was not duly elected as a member of Congress for the second district of the State of Iowa.

Mr. BINGHAM. I object to that resolution; and I rise to a point of order: that the resolution reported from the Committee of Elections on this case has been postponed to a day certain. This is the converse of that resolution, and I hold that the question cannot be brought up in that way.

Mr. DAWES. The resolution postponed to a day certain was on a different point. This does not conflict with it at all. The resolution postponed to a day certain was not that Mr. Vandever was not elected to this house, but that after having been elected he had vacated his seat. This is a resolution that Mr. Vandever was not elected, and that therefore he is not entitled to a seat upon this floor. I reported from the Committee of Elections the pape

of Mr. Byington, in which he contests Mr. Vandever's right to a seat upon this floor. I am willing that the subject shall be postponed to a day certain, when the contestant might be heard.

Mr. STEVENS. Let it be postponed to Monday next.

Mr. COX. I offer this additional resolution:

Resolved, That Legrand Byington was duly elected a member of this house from the second district of the State of Iowa.

That will bring the matter before the House.

Mr. BINGHAM. I make the point of order that the gentleman from Ohio cannot offer two resolutions at the same time.

Mr. COX. I will put them both in one resolution for the sake of obviating the gentleman's objection.

The SPEAKER. The Chair knows nothing in the rules which prevents the gentleman from offering a series of resolutions.

Mr. BINGHAM. They are upon different subjects.

The SPEAKER. They both pertain to a seat from a particular district in Iowa.

Mr. DAWES. After making the further remark that the Committee of Elections have discharged their duty by bringing this subject before the House, I do not intend to occupy the time of the House at all, but, at the suggestion of the chairman of the Committee of Ways and Means, move to postpone the consideration of this subject until two o'clock on Tuesday next.

The further consideration of the case was postponed to the 14th of February when Mr. Byington was permitted to argue his own case, which he proceeded to do; after which Mr. Cox's resolutions were rejected—yeas 84, nays 28—and the report of the committee was agreed to without division.

NOTE.—Mr. Byington's speech will be found in vol. 47 of Congressional Globe, p. 964.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

MORTON *vs.* DAILY, *of Nebraska.*

The governor of Nebraska Territory gave the certificate to Mr. Morton, but upon the ground of discovered fraud revoked it, and gave a second to Mr. Daily. The House decided that Mr Daily should occupy the seat during the pendency of the contest.

The entire vote of a precinct was rejected because of fraud.

Votes cast from Pawnee Indian reservation were rejected because of their illegality under the act of Congress organizing the Territory. The Indian reservation is no part of the Territory. A county is not *organized* until it has elected officers under the territorial laws.

IN THE HOUSE OF REPRESENTATIVES.

APRIL 14, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

That, in conformity with the instructions of the House embodied in a resolution adopted at the last session, in the following words:

Resolved, That the papers in the case of the contested seat for delegate from the Territory of Nebraska be referred to the Committee of Elections, and that they be authorized to investigate and report on the same without regard to notice; and that all other cases of contests for seats in this house be also referred to that committee for investigation and report—

they have examined and considered all the evidence referred to the committee and contained in Mis. Doc. No. 4, of the last session, which was taken by either party on notice to the other. The election out of which this contest has arisen was held on the 9th of October, 1860, and the official canvass by the territorial board of canvassers showed the following result:

For Mr. Morton	2,959
For Mr. Daily	2,945
Majority for Morton	14

Mr. Morton accordingly received the certificate of election, and Mr. Daily took the position of contestant. Subsequently the governor of the Territory gave Mr. Daily a certificate of election on the ground of alleged fraud in the vote counted for Morton, revoking in said certificate, as far as he was able, the certificate before given to Mr. Morton. Between these two certificates, as *prima facie* evidence of an election, entitling the holder to be sworn, in the first instance, and occupy the seat pending the contest, the House decided at the last session in favor of that held by Mr. Daily, and he has accordingly occupied the seat, and Mr. Morton has been contestant during the pendency of the contest. But the notice of contest and answer, and all the testimony, was taken, as appears by Mis. Doc. No. 4 of the last session, while Daily occupied the position of contestant.

But the committee were, in the hearing, relieved from all embarrassment from this cause by the resolution adopted by the House and already quoted.

The allegations and answers of the parties, in support and refutation of which the evidence was taken, are found on pages one to six, inclusive, of the document already referred to.

Constituting a part of the 2,957 votes, counted by the canvassers for Mr. Morton, were 122 votes returned as polled in the northern precinct of L'eau-qui-Court county, 18 votes returned from the Monroe precinct in Platte county, 39 votes returned as polled in the county of Buffalo, and 20 votes returned at the Rulu precinct in Richardson county—in all 199 votes. The sitting delegate, in his specification, challenges all these votes for different reasons, applicable to different precincts. The committee call attention to the evidence having a bearing upon the votes cast at each of these precincts:

Northern precinct of L'eau-qui-Court.—The specification of the sitting delegate is, that no election was, in fact, held in said precinct; that if any part of said votes were, in fact, cast anywhere, it was at some place not within the precinct or the county of L'eau-qui-Court, and by persons not resident within the said county, nor within the Territory, and that the said precinct consists of lands to which the Indian title has not been extinguished. The place where this alleged election was held was at the house of one A. B. Smith, at a point on the Missouri river about forty miles above the county seat of L'eau-qui-Court county, nearly opposite to the Yancton Sioux agency in Dakota Territory. A witness by the name of Westerman, (page 7,) who was a resident of the county for more than four years, testifies that he was at this Smith's house less than two months before the election, and found in all that region only two log cabins and five men, three of whom he knew had left before the time of the election, and that when the precinct was established there he was appointed to be one of the judges of the election, and went there for the purpose of ascertaining how many votes could be polled by actual residents, and found only five men. He visited this place, also, shortly after the election, and could only find two men. Jacob Hack, William W. Warford, and James Cox, three other witnesses, testified that they were at the election and voted, and all live in Dakota Territory. Warford was one of the judges of the election. They all three agree in their testimony that, notwithstanding there were polled 122 votes, there were not during the whole day over forty persons in all present at the poll; and Cox, whose testimony is on page 31, estimates the number at only from 20 to 25. They agree in this, that of this number five or six were half-blood Indians, and eight or ten full-blood Indians; that Indians, half-breeds, and whites all voted, and a portion of them voted a number of times, sometimes by changing their names and clothes, and sometimes by a sort of proxy, calling the name of some absent friend, and depositing a ballot for him. Of those who thus voted, many lived in different and distant parts of the country; some in the State of Iowa, some at Fort Randall, some in dif-

ferent parts of Dakota Territory, and one at St. Louis. Cox examined the poll-book, which is in evidence, and testified that he knew forty-seven persons whose names appear on the list, and that all of them were non-residents of Nebraska except A. B. Smith, at whose house the election was held, and John L. Tierman, who lived at the same place. John Brazo, one of the names on the list, is an old negro fiddler, who lives at Sioux City, Iowa, one hundred and fifty miles distant. The committee make the following extracts from the testimony of Cox, commencing on the 32d page:

Question. Did you see any persons vote, and how many more than once?

Answer. I saw six persons vote more than once. I saw one man vote four times, another three times, another twice, and another I do not remember how many times, not less than twenty. His name was Peas. And the rest I cannot say how many times they did vote.

But, from the answer of the same witness to the fourth question, on page 36 of the evidence, it appears that they continued voting in this manner until they had supposed they had accomplished their purpose.

3d question. State whether or no on the day of the election of which you have spoken you heard any observation to the effect that there were votes enough now to elect Morton, or to the like effect; and if so, by whom the observation was made, and at about what hour of the day.

[Objected to by attorney for Mr. Morton, for the reason that it calls for the declaration of persons not parties to this contest, which is not competent evidence.]

Answer. I heard such an observation made by Charles Booge between the hours of four and five o'clock.

4th. Mention the exact words he used, as nearly as you can recollect them, and to whom they were addressed.

Answer. He said, "I think we have about enough votes to elect Mr. Morton." He was then speaking to the judges and clerks of the election and Captain Todd.

5th question. Who is Charles Booge? Where does he live, and how was he occupied during that day at the poll?

Answer. He is sutler for the Indians, lives on the Yancton reserve, and occupied that day in urging men to vote for Mr. Morton.

6th question. Did you see at the poll any printed ballots containing the name of Mr. Morton, as delegate, and did you see any containing the name of Mr. Daily?

Answer. I saw some containing the name of Mr. Morton, but none for Daily.

There were seventy-three votes cast at this election at other known and established precincts in the county of L'eau-qui-Court, where residents known then and since to be *bona fide* inhabitants can be easily found by any one. The census of 1860, which, by law, was completed on the first of November, 1860, twenty-two days after this supposed election was held, shows a population in the whole county of only one hundred and fifty-two persons, men, women, and children, establishing a fair proportion between the seventy-three *bona fide* voters who cast their votes at the established precincts and the whole number of inhabitants in the county, as the ratio usually obtained in all newly settled counties. But if to these seventy-three undisputed votes at old established precincts there be added the one hundred and twenty-two alleged to have been cast at this new and hitherto unheard-of settlement, the whole number cast in the county would be one hundred and ninety-five votes, forty-three more than the whole number of inhabitants in the county, men, women, and children, all told. To meet this testimony, on the part of Mr. Daily, if this had been a *bona fide* settlement of sufficient number to justify a poll of 122 votes, it would have been the easiest thing possible for Mr. Morton to have produced the testimony of living witnesses of such weight and number, from the very settlement itself, to put the matter beyond all possible doubt, and to expose the falsity of the evidence here produced; but Mr. Morton, instead of resorting to this more satisfactory method of establishing the real truth, has contented himself with attempting to shape the credibility of two or three of the witnesses offered by Mr. Daily, by attempting to show, as to two of them, that money paid them for coming in the winter several hundred miles to Omaha to testify to these

facts before the authorized magistrate living there, had been paid them for the character of the testimony itself, and that thus they were bribed witnesses; and, as to one other witness, that he was one of the judges of this election, and that he is now swearing against his own return as a sworn judge of election. As to the witnesses paid for coming to Omaha, the committee are of opinion that Mr. Morton has wholly failed in his attempt to show that they were bribed. As to the witness swearing against his previous return, the committee are of opinion that that fact does affect his credibility, and that if his testimony stood alone and uncorroborated it must be taken with great caution and allowance; but when corroborated, as it is in all essential parts by the other witnesses, and especially by the testimony of Cox, about whom nothing has been ever said by Mr. Morton to impair his credibility, the committee have no hesitation in expressing their conviction that this entire vote, alleged to have been cast at the northern precinct of L'eau-qui-Court county, is fraudulent, and should be rejected. It was all cast for Mr. Morton, and therefore 122 votes, under this allegation, must be deducted from his poll.

Monroe precinct, Platte county.—The allegation of Mr. Daily touching this vote is—

That of the persons who voted in the Monroe precinct, in the county of Platte, five were not residents of the last-mentioned precinct or county, and the rest were inhabitants and then residents of the Pawnee Indian reservation.

The testimony in support of this allegation is from Charles H. Whaley, (page 50.) He is a resident of the precinct, and has been a representative in the legislature of the Territory, and his testimony is of such a character that he cannot be mistaken. His reliability has not been questioned. The committee therefore give his testimony entire.

Charles H. Whaley, of lawful age, being first duly sworn according to law, makes the following answers to the questions proposed, to wit:

1st question. What is your age, occupation, and place of residence?

Answer. Age, thirty-three years; occupation, attorney and farmer; residence, Monroe, Platte county, Nebraska Territory.

2d question. In what precinct in Platte county do you reside?

Answer. It is called the Monroe precinct.

3d question. Were you there on the day of the general election held on the 9th of October last?

Answer. I was.

4th question. State what you know about non-residents of said precinct voting at said election; how many in all; for whom the votes were given; and the grounds of your knowledge.

Answer. I am acquainted with all the residents of that precinct who voted at that election; they were twenty-eight in number. The non-residents were twenty-one. I believe, of the non-resident voters, there were eighteen for Mr. Morton and three for Mr. Daily. There were two kinds of tickets voted. The tickets with Mr. Daily's name on were written, and those with Mr. Morton's name on were printed. The written tickets I distributed myself to the persons voting them, and saw them put in the ballot-box by persons who were residents of that precinct. I saw the votes canvassed, and there were fifteen of these written tickets, containing Mr. Daily's name and the names of our county and precinct candidates—I mean the republican candidates.

5th question. State, if you know, where the non-residents, eighteen of whom you say voted for Mr. Morton, resided at that time.

Answer. The following persons, to wit, J. L. Gillis, R. B. Gillis, D. A. Elliott, Charles Zealer, G. W. Hollins, Lewis G. Boyer, Joseph McFadden, and Charles Cooper, resided on the Pawnee Indian reservation. The following named persons, Frederick Koup, P. E. Bogert, Francis Grauer, and James C. Crawford, resided in Cuming county, but were at work at that time on the brick-yard on the said reservation. The following persons, M. P. Cook, Isaac Moore, Edwin R. Capran, and Israel D. Ward, were surveyors, and said their homes were in Nebraska City. L. B. Gorham resided in Omaha city; Moses Hotelling was driving a team for Gorham, and I do not know his place of residence.

6th question. State where the three that you say voted for Mr. Daily resided, and how you know that there were just three and no more.

Answer. I believe they resided in Cuming county. They were at work at the time on the brick-yard before mentioned. The fifteen votes that I have spoken of before included Mr. Daily's name and the candidates for county officers. The remaining three votes con-

tained only Mr. Daily's name. I saw the fifteen resident voters for Mr. Daily deposit their votes. I know that there were three other votes cast for Mr. Daily, but who cast them, and where they resided, I only know from what they told me.

7th question. State whether or not you were present during the entire canvassing of the votes given at that precinct on that day, and whether you saw each and all of the ballots counted.

Answer. I was present all the time, from the opening to the closing of the poll. I saw all the ballots counted, and heard the result declared by the judges.

8th question. State whether you are sojourning in this place at present, and in what character.

Answer. I am here at present as a member of the legislature.

Cross-examined.

1st question. At elections held prior to the late election for delegate, in Monroe precinct has it, or has it not, been the practice for residents on the Pawnee Indian reservation to vote?

[Objected to by attorneys for Mr. Daily, on the ground of immateriality.]

Answer. Since the reservation has been set apart, they have not voted at the Monroe precinct.

2d question. Do you know of any residents of the Pawnee Indian reservation voting at any election prior to the election held in October last?

[Objected to by attorneys for Mr. Daily, on the same grounds.]

Answer. I do not, since the Indians were removed to the reservation, which was a year ago some time in the fall.

3d question. State whether the twenty-one non-resident voters, when presenting their votes at said election, were challenged.

[Objected to by attorneys for Mr. Daily, on the ground of immateriality.]

Answer. I believe a majority of them were.

4th question. State whether those challenged swore in their votes.

Answer. I suppose I must answer yes; but in my opinion it was not an oath that many of them took. The oath was read over to those persons on the reserve who were challenged, and they qualified it by saying they would take the oath provided that the Pawnee Indian reservation was a part of Platte county.

5th question. State whether that portion of the Pawnee Indian reservation in which they reside is included in the defined limits of Platte county.

Answer. No, sir; it is not. By an act of the legislature, attaching a part of Monroe county to Platte county, only so much of Monroe county as is not included in the Pawnee Indian reserve was attached to Platte county: I mean to say that Monroe county was incorporated into Platte county, with the exception of what was included within the boundaries of the Pawnee reserve.

6th question. The persons whom you have spoken of as residing in Cuming county, do you know that, at the date of the election, they had been living on the reserve less than twenty days?

Answer. No, sir; I am not positive as to the time they had been there.

7th question. How long had the surveyors been there of whom you have spoken?

Answer. They came there that day, and went away the next.

8th question. What is your politics?

Answer. Republican.

Re-examined.

1st question. You have said that those persons whom you designated as non-residents, and who were challenged, expressed their willingness to take the oath upon its being read to them, provided the Pawnee Indian reservation was a part of the county of Platte. What answer, if any, was made by the judges to this observation?

Answer. I cannot express the answer in the words used. They assented to that, and took the ballots.

2d question. What is the name of the agent for the Pawnee Indians; whether or no he voted, and whether or no he qualified his oath in the manner you have mentioned?

Answer. His name is J. L. Gillis. He voted, and qualified his vote in that manner.

3d question. State whether or no he was the first of the residents on that Indian reservation who offered to vote.

Answer. I believe that he was.

CHAS. H. WHALEY.

Recalled.

1st question. State whether the Monroe precinct comprises any part of the Pawnee Indian reservation; and if not, how far was the poll held from the nearest line of that reservation?

Answer. It does not comprise any part of the reservation. The poll was held about three miles from the nearest line of the said reservation.

Cross-examined.

1st question. How far is the line of said reservation nearest to the place of voting in said Monroe precinct from the nearest line of the precinct?

Answer. I have understood from the commissioners who formed the precinct that the western line of the precinct is the same as the eastern line of the reservation.

2d question. Do you, of your own knowledge, know where the western boundary of the precinct is?

Answer. No more than what I have stated. The treaty makes the eastern boundary line of the reservation, running north and south from the point where the Beaver creek enters into the Loup fork, and that line I understand to be the line of the precinct.

3d question. Do you know that N. P. Cook, Isaac Moore, Edwin R. Capran, and Israel D. Ward, (whom you have spoken of as surveyors,) had not at the date of said election been in the county of Platte the necessary time to make them legal voters?

Answer. The first I saw of them was, I think, about four or five days before the election. At that time I saw them cross the ferry at Columbus from the south to the north side of the Loup fork of the Platte river. They said they had been surveying south of the river. The next I saw of them was on the day of the election.

4th question. Might they not have been in the county and you not have known it?

Answer. Of course they might.

Re-examined.

1st question. You say you saw them crossing the ferry at Columbus. They told you they had been surveying south of the river. Is that section of country where they said they had been surveying in Platte county?

Answer. A part of it is and a part of it is not, I suppose. I understood them to say they had been running township lines from the Platte river to the Loup fork. Platte county does not extend west of the sixth principal meridian to the Platte river.

Re-cross-examined.

1st question. Might they not have been surveying south of the river and still been altogether in Platte county?

Answer. That would depend how far they ran their lines. They might have been running lines east and west, and still be in Platte county.

Recalled.

1st question. You say you learned from them that they were running township lines: how long, in your opinion, would it take them to run all the township lines south of the river in Platte county?

Answer. I don't know that I am well enough acquainted with surveying to enable me to judge correctly; but I think the township lines south of the Loup fork could be easily surveyed in ten days, as I think there would be but one tier of townships in that portion of the county.

Re-cross-examined.

1st question. In running township lines, what is an ordinary day's work?

Answer. I do not know.

2d question. Are you a surveyor?

Answer. I am not.

3d question. Will you or will you not say, upon your oath, that the surveying party was not also engaged in sectionizing and subdividing?

Answer. I know of my own knowledge that they were not on the north side of the river, and Captain Cook told me they had not been. Captain Cook is the one previously referred to as M. P. Cook, and had command of the surveying party.

CHAS. H. WHALEY.

From this testimony it appears that nearly all of these voters were at the time residents upon the Pawnee Indian reservation, outside of the precinct; that when challenged they took the oath, with the condition attached, "provided the Pawnee Indian reservation was considered a part of Platte county." Statutes of Nebraska, laws 1855–'56, page 49, require as a qualification of a voter that he reside in the Territory forty days, in the county twenty days next preceding the election, and at the precinct in which he votes at the time of the election. From this testimony it appears that the Pawnee Indian reservation was not within this precinct, and that the poll was about three miles from the

nearest line of the reservation. But the committee are of the opinion that for another reason the votes cast at this precinct by persons resident upon the Pawnee Indian reservation were illegal. The act of Congress organizing the Territory of Nebraska in the first section says:

Provided further, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Nebraska, until said tribe shall signify their assent to the President of the United States to be included within said Territory of Nebraska.

It was not claimed before the committee, nor do the committee understand it to be true in fact, that the Pawnees have ever made any such stipulation in their treaty as is here mentioned, or that they have ever signified their assent to the President of the United States to have their reserves included within the boundaries or constitute a part of the Territory of Nebraska. It follows, therefore, that persons residing upon this reserve are residents upon "no part of the Territory of Nebraska," and are not entitled to vote therein. These votes were twenty-one in number, eighteen for Mr. Morton and three for Mr. Daily, and must be deducted from their poll accordingly.

Buffalo county.—The specification of Mr. Daily challenging this vote is as follows:

That the county of Buffalo was then and yet remains unorganized; and that the poll held therein was, moreover, open, and votes were cast thereat on the day next succeeding the day of election; and that several of the votes thence returned were cast by non-residents of the said county.

It was agreed by the parties (page 63 of the testimony) that the evidence of Governor Black, given in the contested election case of Daily and Esterbrook, in the 36th Congress, touching the organization of this county, should be taken and used as his evidence upon the same point in the present case. Upon a review of that testimony, reprinted, (commencing on page 63,) the committee have arrived at the same conclusion as was arrived at by the Committee of Elections of the last House, and which conclusion was sustained by vote of the House itself. Your committee cannot better state that conclusion than in the words of that committee:

By an act of the legislature of Nebraska Territory, March 14, 1855, provision was made for the organization of this county. This is its language: "That all that part of the Territory included in the following limits is hereby declared organized into a county to be called Buffalo: Commencing at a point in the centre of the Platte river, ten miles east from the mouth of Wood river; running thence westward up the southern channel of the Platte to the mouth of Buffalo creek; thence north thirty miles; thence east to a point directly north of the place of beginning; thence south to the place of beginning. The seat of justice is hereby located at Nebraska Centre."

No steps were taken, under the laws of the Territory, for the organization of this county by the election of officers; and it is the opinion of the committee that without such election there could be no organization. The act of the legislature does not organize a county; it merely provides for and authorizes an organization—that is, it authorizes an election to be held for county officers, under the general law regulating elections. If no such election is held, the county, notwithstanding the act of the legislature, cannot exercise any of the powers of an organized county, and cannot legally vote either for territorial officers or delegate to Congress.

The legislature of the Territory of Nebraska has provided, by an act in relation to new counties, "that whenever the citizens of any *unorganized* county desire to have the same *organized*, they may make application by petition, in writing, signed by a majority of the legal voters of said county, to the judge of probate of the county to which such unorganized county is attached; whereupon said judge of probate shall order *an election for county officers* in such unorganized county." It then provides for a notice of the election, and a return of the votes "to the organized county," the execution of the necessary bonds by the officers elected, and the entire mode of consummating the organization. And it further provides that until this is done, "all unorganized counties shall be attached to the nearest organized county directly *east* of them for election, judicial, and revenue purposes."

The committee do not suppose that the legislature intended to dispense with this mode of organization by the simple use of the word "*organize*" in the act creating a county. To suppose that they did would be to assume that they designed to prevent an election by the people of the necessary county officers. They know of no possible mode of legally organizing a county except by the election of officers by the people—a rule which must meet with universal assent under a popular form of government.

It is not pretended that Buffalo county was attached "to the nearest organized county directly *east* of" it for election purposes, for the vote is reported from Buffalo county directly; and hence the only question to be inquired into is, whether or not it was so organized as that a vote could be legally polled within it?

It appears from the evidence that, in May preceding the election, the governor of the Territory was solicited "to *appoint* the county officers for Buffalo county," but that finding himself possessed of "no such power," he declined to do it. The governor was clearly right in this determination. He had no power to appoint officers; not even to fill a vacancy. He had once possessed this latter power, but the legislature had taken it away, and had provided that the vacancies should be only filled by election. But he was as clearly wrong in the other conclusion to which he came. He says that he considered "that Buffalo county was *fully organized* by the act of the territorial legislature." How it was organized *without officers* he does not say, and the committee have already stated that, in their opinion, such a thing is impossible. But, acting upon this strange assumption, he says he advised the course which he considered necessary to be taken. This was, that application should be made to the county commissioners of the nearest county on the east to have the initiatory steps taken for the election of county officers. It is not material to inquire whether he was right or wrong in this, because it does not appear that any such steps were ever taken. On the contrary, it is in proof that a few persons met together, without any notice, and, after the manner of a public meeting for political or other purposes, elected a president and secretary, and, upon *mere motion and vote, chose all the county officers!*

The proceedings of the meeting were signed by the president and secretary, and forwarded to the governor, who, upon the strength of it, commissioned the officers so chosen, although there is no law authorizing him to issue commissions to county officers. And these are the officers who must have conducted the pretended election in Buffalo county, and who returned the 292 votes sent from that county for the sitting delegate, [then Mr. Esterbrook.] The committee consider the whole of these proceedings irregular and void in law.

The committee cannot omit further comment upon this extraordinary proceeding; for, to your committee, extraordinary it seems, in every sense of the term. The meeting was held on the 25th of June, 1852, at the place designated in the act of the legislature as the county seat, and where, according to the proof, there is "*one dwelling-house, one storehouse, one barn or stable, and one warehouse,*" and where but "*three persons*" constituted the population. The object of the meeting was avowed to be the "*recommending* suitable persons to fill the several offices of Buffalo county." And this object was carried out by the simple adoption of the several *motions* put to the meeting. For example: Mr. Charles A. Henry moved that Henry Peck be chosen probate judge, Charles T. Lutz sheriff, Joseph Huff commissioner of one of the precincts, Patrick Care justice of the peace, and John Evans constable, and they were all so chosen by the adoption of the motion. And so of all the rest. And then it was resolved "that Dr. Henry, with men living in the eastern precinct, do have them *recommend* suitable persons to fill the offices of justice of the peace and constable" in a precinct not supplied with officers at this meeting. And the whole proceedings closed with a resolution to the effect that the meeting "*recommend* the above-named gentlemen to hold the several offices to which they have been *nominated* by this meeting, and request the *governor* of this Territory to *commission* them for said offices."

It will be seen that this meeting merely "*nominated*" these officers, and *recommended* them to be *commissioned* by the governor; or, in other words, that it designed that the governor should *appoint* them. It has been already stated that the governor had no such power—that he could have nothing to do with the selection or commissioning of officers. Yet, notwithstanding this want of power, he did both *appoint* and *commission* the persons recommended and nominated by this meeting, and several others who were not recommended. It needs no argument to prove that no authority to hold an election or to transact any county business was conferred upon these persons by his act, and that all their proceedings are absolutely void. It is of no consequence to inquire what power he considered himself as possessing, since the fact that he did *appoint* them appears in proof. In a letter dated July 26, 1859, and written from the "executive chamber," to one of the persons nominated to him, he says: "I have this day *appointed* the following officers," &c., going on to enumerate those who were nominated by the meeting. All these proceedings were in clear violation of law.

The foregoing facts in relation to the pretended organization of Buffalo county being made by the contestant, [then Mr. Daily,] and the sitting delegate [then Mr. Esterbrook] having offered no evidence of any other organization, it is necessarily to be inferred that there was no other; since, if there had been, he would have had no difficulty in showing it. Indeed, he has left it to be inferred from his mode of cross-examining the governor, whose testimony has been taken, that he did not rely upon any organization, but upon the legality of that made by the governor. The committee, therefore, conclude that there was no other, and have no difficulty in deciding that to be clearly in violation of law.

This committee agreeing with that committee that Buffalo county had not been organized, the thirty-nine votes counted by the canvassers for Mr. Morton, as cast for him in this county, must be deducted from him in this poll.

It was also claimed by Mr. Daily, under his specifications, that 108 votes counted for Mr. Morton as from Kearney and Shorter counties should be thrown out for want of sufficient notice of the election. The only testimony upon this point is from a single witness, Henry W. Depuy, (page 75.) His testimony was to the effect that he was at Kearney City the day before and the day of the election, and that on the morning of the day before the election he saw notice of the election being posted up, and on the evening before the election he saw the clerk of Kearney county start with election notices to the judges of election at Cottonwood Springs, in Shorter county, ninety miles distant from Kearney City, where a precinct had been organized. This evidence, however strong in its tendency to produce the conviction that no other notices had been given of the election at these precincts before that day, nevertheless lacks the essential proof that these notices were the first thus put up, and there being no evidence of fraud connected with this poll, the committee do not recommend that these votes be rejected. It was also claimed by Mr. Daily that all the votes polled for Mr. Morton at the precincts of Rulu, Arago, and St. Stephens, in Richardson county, about 140 in all, should not be allowed him, first, because these precincts are included in what is called the half-breed Indian reservation. The committee are of opinion, from the express and unequivocal organic act of the Territory, already quoted, that an Indian reservation constitutes no part of the Territory of Nebraska unless by consent of the Indians themselves, made known in the manner specified in the act; but this half-breed reservation differs in some respects from an ordinary Indian reservation. It was stated to the committee, and not denied, that these lands had been divided, or partitioned off, to the half-breeds in severalty, and the government has given them patents. Whether this would change the character of the reservation, so as to take it out of the exception in the organic act, the committee do not think it necessary to determine, since the result arrived at by them does not depend upon such decision. The vote at Rulu, on this reserve, is further objected to by Mr. Daily, because two of the judges of the election were residents of the precinct, and twenty-four non-residents of the precinct voted therein. The law clearly provides that the voter must reside within the precinct where he casts his vote. The laws of the Territory (1855–'56, page 50) provide—

> Every free white male citizen of the United States who has attained the age of twenty-one years, and who shall declare on oath their intention to become such, and shall have taken an oath to support the Constitution of the United States, and the provisions of the organic act of this Territory, shall be entitled to vote in the precinct where he resides at all elections, provided he has been an inhabitant of the Territory forty days, and of the county twenty days, next preceding the election.

While the committee have been at all times disposed, so far as they can, consistently with the provisions of law, to give effect to the will of the voter, expressed in good faith, they do not see how they can count the vote of a non-resident of a precinct any more than they could a non-resident of the county or Territory. The provision of law that a man must vote in the precinct where he resides seems to the committee to be a wise one to prevent double voting, and they know of no way to enforce that wise provision except to insist upon its observance. From the evidence of Dundy (page 40) it appears that twenty-four non-residents of Rulu precinct and five half-breed Indians voted at that precinct. Mr. Morton contented himself in this case, also, with an attack upon the credibility of the witness, E. S. Dundy, and called several witnesses who swear they would not believe him under oath. But these witnesses do not live in the same town or neighborhood with Mr. Dundy, who resides at Falls City, but in or near the town of Rulu, nine miles distant from Falls City, and it was

made to appear that a bitter feud existed between the people in these two towns. There were called in reply twenty-one witnesses, the immediate neighbors of Mr. Dundy, who sustained his character for truth and veracity, and the committee have given full credit to his testimony. It appears that twenty-four non-resident whites and five half-breed Indians voted at this precinct, but it is uncertain for whom they all voted; but as Mr. Daily received but nine votes in all at this precinct, twenty of them at least must have voted for Mr. Morton. The committee therefore reject that number from the count of Mr. Morton.

In answer to these allegations on the part of Mr. Daily, and in support of his own claim to the seat, Mr. Morton served upon Mr. Daily his answer, containing twenty-three specifications, (page 3 of the testimony.) In support of many of these specifications he offered no testimony. Those in support of which he did offer testimony the committee now proceed to examine. The second, third, and fourth specifications relate to the vote in Falls City, Richardson county, where Daily received 104 votes and Morton 17 votes. The only evidence among the many witnesses which has a tendency to support said allegations is from one James Buchanan, (page 134 of the testimony,) one of the judges of the election. The evidence of this witness, in its character improbable, is contradicted by that of his own brother, who was a clerk of the election, by one of the other judges, and by his own statement on the night after the election, as testified to by one Coleman, (page 152.) Buchanan is also successfully impeached by twenty-one witnesses, testifying from intimate knowledge of his character for truth and veracity in the community in which he lives. Several of these witnesses say, in addition, that he has the character of a notorious ballot-box stuffer. The committee refer in this connexion particularly to the testimony of David Dorrington, (page 151 of the testimony.)

It also appears that the aggregate vote at Falls City was no larger, if as large, at this election, and that the vote of Mr. Morton, as canvassed, was quite as large as that of the other candidates of his party. The committee see no reason, therefore, for rejecting the vote at Falls City. The fifth specification alleges that the county of Pawnee was not organized according to law, and no election could be legally held therein. By the statutes of Nebraska, "whenever the citizens of any *unorganized* county desire to have the same organized, they make application by petition, in writing, signed by a majority of the legal voters of said county to the judge of probate of the county to which said unorganized county is attached, whereupon said judge of probate shall order an election for county officers in such unorganized county." Notice is to be given of the election, and a return of the votes to be made to the organized county. All unorganized counties are attached to the nearest organized county directly east of them for election, judicial, and revenue purposes. The only evidence adduced by Mr. Morton to show that this county is unorganized is a certified copy of the proceedings on file in the clerk's office of Pawnee county, (page 121 of the testimony,) which certified copy he claims contains no evidence of the preliminary proceedings necessary to be had before an election of county officers. This county was attached to Richardson county before its organization, that being "the nearest organized county directly east;" and the law requires a return to be made "to the organized county." Mr. Morton should have looked, therefore, among the records of Richardson, not Pawnee county, for these preliminary papers, where, for aught that appears to the contrary, they may be found. He has produced from Pawnee the record of the election of county officers for Pawnee and the certificate of the proper officer of Richardson county, that these several officers of Pawnee had "filed their oath of office according to law in such case made and provided." And the certificate from Pawnee county itself declares these officers to have been "duly elected and qualified." So far as Mr. Morton has produced any records of this organization they appeared to be in conformity with law. He has produced no evidence from the proper custodian of the preliminary papers that they do not also con-

form to the law. This county has also been recognized by the legislature of the Territory as an organized county. At the session of 1857–'58 it was by act of the legislature made a separate and distinct representative district, and authorized to elect one member to the lower branch of the legislature, and has exercised this right ever since by the election of such representatives, whose right to a seat by virtue of such election has been admitted by the legislature. This county, with Richardson, has been constituted a council district, and the two counties have been in like manner authorized to elect one councilman. The committee are therefore of opinion that it is quite too late now, after such legislative recognition, to question the original organization of the county, especially upon so frail evidence as that referred to the committee. After the hearing and argument before the committee was closed, Mr. Morton produced a certified copy of an act of the Nebraska legislature passed pending this contest, entitled "An act legalizing the first organization of Pawnee county." The committee think that if there had ever been in such organization any irregularities, they had been quite as effectually legalized by previous legislation as by this act.

The third objection made by Mr. Morton to the vote of Pawnee county is, that "in the fourth precinct, in said county, where said Daily received 13 votes, and this respondent 7 votes, there was no legally constituted election board; those acting as judges were neither sworn nor qualified, as required by law; therefore the votes of said precinct ought to be rejected."

The only evidence in support of this allegation is that of Newcomb, (page 157,) from which it appears that while the county commissioners appointed three persons to serve as judges of election in each of the two precincts of Wyoming and Otoe, the returns from each of those precincts were signed by only one of the persons thus appointed, with two other persons associated with him in each case, and that there is no record on file in the clerk's office of the appointment of these two persons at each precinct to act as judges of the election. The committee understand the law of Nebraska to authorize the appointment and qualification of persons to act as judges of election in the absence of those regularly appointed beforehand by the county commissioners. Mr. Morton does not show that these men thus acting were not duly qualified. He only shows that there is no record of such qualification in the county clerk's office, nor has he shown that the law requires any record thereof to be kept there. In the absence of any certificate of such qualification, it is always a matter of proof by parole whether such judges were qualified or not. The committee do not assume that they were not qualified. The only evidence offered by Mr. Morton in support of his nineteenth allegation was a joint affidavit, (page 113 of the testimony,) signed by three persons, Johnson, Wagner, and Barnard, and sworn to on the day of the election, without notice to Mr. Daily, and before the votes were canvassed, or any notice of contest whatever. The committee for this reason rejected this testimony; but it appeared from the cross-examination of one Hedde, (page 59,) a witness produced by Mr. Daily, that no legal notice of this election was given at that precinct, although the vote seems to have been fairly cast; yet the committee deem the notice prescribed by law essential, and do not feel at liberty to say, in the absence of such notice, that all persons had an opportunity to vote. The committee are aware that the time of this election was fixed by law, and that all are presumed to know the law; but in a new country like this, in precincts newly opened and counties sparsely settled, they deem actual notice a safer rule, and therefore reject the 29 votes cast for Mr. Daily at the precinct of Grand Island, in Hall ounty. Under the twenty-third specification Mr. Morton claimed that the votes in the counties of Clay, Dodge, Cass, Hall, Johnston, Lancaster, Nemaha, Pawnee, and Washington, although counted by the board of canvassers, should all be rejected for defect in the form of return. It was not claimed by Mr. *Morton* that these returns were false in fact, but that the law required that

"*abstracts*" of the vote of each county should be returned to the board of territorial canvassers, when in truth the return from each of the above-named counties was the aggregate of the vote for each of the respective candidates for office in that county. Admitting that Mr. Morton has made the true distinction, and that an aggregate of the votes thus cast for each candidate in any given county is not an abstract of such votes, is it the duty of the committee to reject the votes thus returned for that reason? If there had been no return at all of the votes cast in these counties, it would have been plainly the duty of the committee to have ascertained by other testimony, if possible, the actual vote cast in these counties. Now, as it is not denied that the returns from these counties state the actual aggregate vote cast in those counties, the committee take them as evidence of such votes, and count the votes so returned and counted by the territorial canvassers.

Mr. Morton offered no evidence in support of his other allegations. During the hearing before the committee Mr. Morton charged that the certificate upon which Mr. Daily was admitted to occupy the seat during the contest was a forgery, made by Samuel W. Black, late governor of the Territory, after he had ceased to be such governor, although he did not charge Mr. Daily with any participation in that fraud. At the close of the argument Mr. Morton offered an affidavit, taken since the hearing was commenced, and desired to examine the witness before the committee. To this Mr. Daily, denying the forgery of the certificate, nevertheless consented that the witness might be examined before the committee, provided that he also had an opportunity to produce other witnesses to repel the charge, and also to prove that the certificate held by Mr. Morton was obtained by bribery. To this Mr. Morton would not consent, because, as he alleged, it would protract the hearing to an unreasonable length. But the committee were of opinion that they had, in this hearing, nothing to do with the certificates; that the House had considered these certificates in deciding who should be the sitting delegate pending the contest, and that nothing was left to the committee at this hearing but to go behind all certificates, and ascertain who had a majority of the legal votes. Mr. Morton also offered to the committee several other affidavits, taken without notice to Mr. Daily, and some of them taken by other parties in other controversies, with which neither Morton nor Daily were connected, and also reports of the testimony of witnesses, given in the hearing of other matters, having no connexion with this case, none of which papers had been referred to the committee of the House, and all of which were rejected by them. In conclusion, the committee state the result of this examination as follows:

Whole number of votes counted by territorial canvassers for Morton..		2,957
Deduct vote of northern precinct of L'Eau-qui-Court county....	122	
Also the vote in Monroe precinct, Platte county.....	18	
Also the vote in Buffalo county.....	39	
Also Rulu precinct, Richardson county	20	
		199
Total for Morton.....		2,758
Whole number of votes county for Daily		2,943
Deduct votes cast for him in Buffalo county.....	3	
Deduct votes cast for him in Monroe precinct, Platte county....	3	
Deduct votes cast for him in Grand Island precinct, Hall county..	29	
		35
Total for Daily.....		2,908
Majority for Daily.....		150

The committee therefore recommend the adoption of the following resolutions:

Resolved, That J. Sterling Morton is not entitled to a seat in this house as a delegate from the Territory of Nebraska in the 37th Congress.

Resolved, That Samuel G. Daily is entitled to a seat in this house as a delegate from the Territory of Nebraska in the 37th Congress.

In opening the debate in the House Mr. DAWES alluded to the contestant's objection to the "abstracts" of votes from several counties:

A technical objection was made by the contestant to the returns from several counties, and that was that they were not "abstracts" of the votes. The law requires that the returning officers of the several counties shall send abstracts of the votes to the board of territorial canvassers. The canvassers of several counties sent the entire votes, the aggregate, and the contestant says that that was not a compliance with the statute; that they should have sent an abstract of the votes.

Now, without stopping to inquire whether that is a proper and legal distinction, the question arose in the committee, what was their duty? Supposing the returning officers had failed properly to return the votes, it was the duty of the Committee of Elections to find out what the vote was. It is not pretended that the returns made are not in point of fact true, or that they did not give the actual votes cast in the counties; but it is claimed by the contestant that they did not give abstracts, but gave the whole votes in aggregate.

Mr. PENDLETON remarked:

* * * * * * * * * * * * * * *

Now, the first point made by the Committee of Elections is as to the northern precinct of L'Eau-qui-Court county, which returned a majority of 122 for Mr. Morton. The allegations made by the sitting member in regard to this precinct are four. They are recited in the report of the committee. They are these: first, that no election was held in the precinct at all; second, that the votes were cast by non-residents; third, that the place of casting the votes was outside the precinct; and lastly, that the Indian title to a great portion of the land in that precinct had not been extinguished. The Committee of Elections threw out the whole vote.

Now, I desire to call their attention to a rule of law which applies as well to cases of elections under the law of 1851, as under the general law on that subject. It is, that the *allegata* and the *probata* must correspond. There is not a scintilla of evidence that any of these allegations were true, except that some of the votes were cast by non-residents. That is all that is pretended or claimed by anybody, and I desire to say to the committee that the proof of non-residence of some voters at a particular precinct would, upon no principle, justify the committee or the House in throwing out the whole vote.

* * * * * * * * * * * * * * *

The county of Buffalo comes next, according to the report of the committee, and what are the facts in reference to that county? In 1859 the county of Buffalo was organized. It is said that it was organized by the appointment of officers by a county meeting, and not by a regular election. Grant it. I make no question about that. Suppose it was so organized, will not a mistake of that kind ever be cured? The officers then appointed have passed away, and others have been appointed. Elections have been held, and the organization of the county has been kept up. Is the fact that originally the officers were appointed by a county meeting and not regularly elected to vitiate through all time the organization of that county? It is only necessary to state the proposition in order to establish the validity of the organization. Would gentlemen have the whole county organization disbanded? Would they have the officers who are now administering the affairs of the county turned out of office in order that you may go back to correct the original mistake, if there was a mistake, in the appointment of officers?

The debate in the House was almost entirely confined to the discussion of facts. The whole subject was laid upon the table—yeas 69, nays 48—leaving the sitting member, Mr. Daily, in the contested seat.

NOTE.—The debate is in vol. 48. For the report: Mr. Dawes, p. 1973; Mr. Worcester, p. 1997; Mr. Dailey, p. 2005. Against the report: Mr. Richardson, p. 1995; Mr. Voorhees, p. 1976; Mr. Norton, 2001.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

JOSEPH SEGAR *again*.

Mr. Segar was again elected to Congress at a special election. The facts are succinctly stated in the report. The committee came to no conclusion, except to ask the House to be discharged from the further consideration of the subject. The House admitted Mr. Segar

IN THE HOUSE OF REPRESENTATIVES,

APRIL 14, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

That those credentials, a copy of which is annexed, consist of a certificate signed by "William Mears, conductor at the court-house at Northampton," "Michael H. Higgins, conductor at the court-house of Accomac," and "John O. Evans, conductor at the court-house of Elizabeth City," dated the 22d day of March last, certifying that at an election held on the 15th day of said March in the several counties composing said district the claimant was duly elected to represent the same in the Congress of the United States. Mr. Segar also presented to the committee during the hearing a proclamation by Governor Pierpoint to the same effect, of date the 26th day of March last, a copy of which is also annexed. The first congressional district is composed of seventeen counties, viz: Middlesex, Westmoreland, Richmond, Essex, Northumberland, King and Queen, Lancaster, Gloucester, James City, the City of Williamsburg, New Kent, York, Warwick, Northampton, Accomac, and Elizabeth City. Governor Pierpoint issued writs of election in due form of law on the 24th day of February, 1862, directed to the sheriffs of the several counties composing this district, requiring them to hold an election for representative to this Congress on said fifteenth day of March. The claimant stated to the committee that he himself took these writs of election to the sheriffs of the counties of Accomac, Northampton, and Elizabeth City, and that in one of these counties he saw the sheriff post up notice of the election at the several election precincts more than ten days before the day of the election, and in the others he saw the notices after they were put up, but whether they were up the time required by law he does not know. But no writs of election reached the sheriffs in the other fourteen counties, nor was any notice of election given, or any election held, at any precinct in any of the other fourteen counties in the district, for the reason that all the other counties were at the time of the election, and had been for a long time, in possession of the rebel army, and the rebel authorities had proclaimed martial law over them. For the same reason no election was held in Elizabeth City county, except at one precinct, Hampton. Notice to the sheriffs of these counties, to the people thereof, the opening of a poll or the casting of a vote at any precinct in any one of them, were all impossibilities.

There were cast at this election in the several voting precincts of Accomac and Northampton, and at Hampton, in Elizabeth City counties, as appears by the several annexed certificates from commissioners in said counties, in all 1,018 votes, as follows:

In Accomac—		
For Joseph Segar	229	votes.
For Arthur Watson	406	"
In Northampton—		
For Joseph Segar	65	"
For Arthur Watson	32	"
For Joseph Yerby	4	"
For James Justice	6	"
For William H. B. Custis	7	"
For Edward P. Pitts	4	"
In Elizabeth City county—		
For Joseph Segar	265	"
Total	1,018	"

Of these, Joseph Segar had	559	"
Arthur Watson	438	"
All others	21	"

The vote of the whole district for governor at the May election, 1859, was—

For Goggin	4,404
For Letcher	3,582
	7,986

The population of the whole district in 1860 was as follows, with the exception of one small county, which contained about 700 inhabitants:

	Census of 1860.
Accomac	18,586
Elizabeth City	5,798
Essex	10,469
Gloucester	10,956
James City	5,798
King and Queen	10,331
Lancaster	5,151
Matthews	7,071
Middlesex	4,364
New Kent	5,584
Northampton	7,832
Northumberland	7,530
Richmond county	6,856
Westmoreland	8,282
York	4,949
Warwick	1,740
Total	121,317
Add to this for county not given	700
Total	122,017

In the counties where this election was held, including all the inhabitants of Elizabeth City county, though there was but one poll opened in that county, there are 32,216 inhabitants. In the counties occupied by the rebel army at the time this election was held, and under martial law, there were 89,001 inhabitants.

The committee have no means of knowing, other than may be inferred from the foregoing figures, what portion of the 7,986 electors, who cast their votes in that district for governor, reside in the three counties where this election was held, or how many of them resided at the time in the fourteen counties where it was impossible to hold any election.

Upon these facts the committee were unable to agree upon any recommendation to the House. They therefore ask to be discharged from further consideration of the subject, and report the following resolution:

Resolved, That the Committee of Elections, to whom were referred the credentials of Joseph Segar, claiming a seat in this house as a representative from the first district in Virginia, be discharged from the further consideration of the subject.

The debate in the House was very brief. Mr. DAWES said:

* * * * After the proceedings in the House on the first application of the memorialist for a seat in this house, Governor Pierpoint, of Virginia, issued his writ, I believe, following the provisions of the statute of Virginia, calling for an election in this district, and, I think, he also followed the recommendation of the report of the Committee of Elections made to

this house in the previous case. The condition of things at the time this election was held was such in that district that, of the seventeen counties, only three were not in the armed occupation of the rebels. and, in one of those counties, Hampton was the only precinct which was entirely clear of the rebels. The writ of election reached the sheriffs in those three counties, and, so far as we know, they gave the notice and the polls were opened in all the precincts of Northampton and Accomac, and at Hampton, in the county of Elizabeth City. One thousand and eighteen votes were cast, of which Joseph Segar received 559, or a majority of the votes cast in those precincts. At the last gubernatorial election 7,986 votes were cast, and at this election 1,018, or about one-eighth of the whole number, and of that one-eighth Mr. Segar had a little more than one-half.

The difficulty which the Committee of Elections encountered was this: they have laid down a principle heretofore, and the House has acted upon it in several cases which have been brought before the House, that if the voters of a district had an opportunity to vote, if there was no restraint upon them so that they could vote, he who had the highest number of votes is entitled to a seat, whether the votes be few or whether they be many; and the question is whether this case came within that rule.

Here were only three counties out of seventeen, and although they are large counties, they contain a little over thirty thousand out of the one hundred and twenty-two thousand of all the inhabitants, and there were polled only one-eighth of all the votes. Whether it could be said that in the other fourteen counties, which were in the occupation of the rebel armies, the voters could not go to the polls and express their opinion at all, or not, or whether it could be said that the voters of these three counties, numbering about one thousand, expressed the wish or desire of the voters in the other counties, so nearly and so fairly that under the present state of things in Virginia, it is right or proper to admit this man to a seat is a question which the committee felt disposed to bring before the House to let them pass upon it.

* * * * It is the desire of the committee, which I represent upon this occasion, that just at the moment when this district and every other can come so near that deliverance that the House can say in good faith and fairly that he who presents himself at our door as a representative does represent the Union sentiment of this district, he shall be admitted here to do it.

I have stated the facts as they existed at the time of the selection of this individual. If they appear to this house to constitute such a state of things as I have described, then the committee will be sustained. If it appears to the House that the facts constitute such a state of things that they cannot say that the Union voters of the district have had an opportunity to express their opinion, and he shall be bid to await until these great and stirring events shall have had their consummation, then, too, the committee will have been sustained. It will be difficult for the House to pass upon this question in any way which shall be against the committee.

Mr. THOMAS, of Massachusetts. Allow me to state that the applicant brings here the regular certificate of the governor of Virginia. The political departments of the government have recognized F. H. Pierpoint as the regular governor of Virginia. All the departments of the government have recognized this as the existing legal government of Virginia. Bringing that certificate, having exactly the same force as that of any other representatives upon this floor from any State of this Union, it is referred to the Committee of Elections.

That constitutes *prima facie* evidence, and the Committee of Elections have reported nothing that controls that certificate.

Mr. DAWES. When this matter was referred to the committee there was no such certificate. The certificate has been obtained since. In point of fact, the certificate was issued before the law authorized its issue; but I do not know that that makes any difference.

* * * Mr. NOELL. I was remarking that we are not called upon to scrutinize these facts which have been referred to by the chairman of the Committee of Elections, but we are called upon to determine whether we shall discriminate against one gentleman, or extend that kind of courtesy to him that we extend to all other persons who apply here under similar circumstances. I do not propose to test the right of Mr. Segar to a seat upon this floor upon the merits of the case, which have been referred to by the gentleman from Massachusetts. My proposition is that he be now admitted to his seat and sworn in as a member of this house, as he should have been, in my judgment, in the first instance, precisely as all the rest of the members of the House have been sworn in upon similar credentials.

The gentleman and the House will remember that when this case was under consideration before, under a former election, there were no writs of election issued. It was so reported by the committee to the House, and the main point in the objection taken to his being entitled to a seat upon this floor was that the governor of the State of Virginia had issued no writs of election, in conformity with that provision of the Constitution which requires it to be done in the case of vacancies. But now it is frankly admitted by the chairman of the committee that all the forms and requisitions of law have been complied with, and, so far as we are permitted to look into the case as it is now presented to us, we have no inquiry to make in regard to those facts that go behind and beyond that election, but we are to take the

credentials, which the applicant has presented here for our consideration, and determine upon those credentials whether he has a *prima facie* case upon which he should be admitted to a seat upon this floor.

As I remarked, I do not propose to discuss the question raised in regard to the position of a portion of the territory in this district; but I would ask the attention of the gentleman to this condition of things: suppose that his idea should be carried out, what kind of position would this Congress be in to-day? If a fraction of a congressional district has not the power and capacity to elect a representative upon this floor, has a fraction of the Congress of the United States power to make laws? Has a fraction of this confederacy a right to elect a President of the United States? If this thing of fractions is to be excluded in determining whether an individual holds public office by virtue of an election held in a congressional district, or throughout the nation, I ask the gentleman from Massachusetts by what condition of things do we find ourselves now surrounded? Sir, if a presidential election was to take place to-morrow there are nine or ten States of this Union in which no election could be held. It matters not that these men are rebels, and that they have made war upon this government. The principle appealed to by the gentleman from Massachusetts applies with equal force to States in a presidential election as to counties in a congressional election. Sir, we have got to go back to that first elementary principle in all free republican governments, that the majority of the people who have the ability to get to the polls and vote at an election, who are loyal to the government and exercise the elective franchise, must determine that election. So long as States remain in the Union as members of the confederacy, we are obliged by the principles involved in our Constitution to treat them in that form.

But, sir, I do not propose to discuss that question. "Sufficient unto the day is the evil thereof." I do not ask any gentleman on this floor to commit himself upon that question. We have enough of troubles on our hands now, without anticipating others. I only ask that Mr. Segar, who is the colleague of gentlemen who have been admitted to seats upon this floor under similar circumstances, and under the provisional government of Virginia, which has been recognized by every department of the federal government, shall be treated as those gentlemen have heretofore been treated—admitted to a seat upon this floor; and if the House, in its wisdom, thinks it worth while to enter into a future investigation of the merits of his case, it can be done. I will not detain the House longer, and I do not suppose any gentleman is disposed to discuss the question at length. I offer the following as an amendment to the resolution reported by the Committee of Elections:

Resolved, That Joseph Segar be admitted to a seat in this house as a representative from the first congressional district of Virginia, and that he be now sworn in as such.

As I understand that the gentleman from Massachusetts does not desire to be heard further upon this question, I demand the previous question.

The previous question was seconded, and the main question ordered.

Mr. BINGHAM demanded the yeas and nays on the amendment.

The yeas and nays were ordered.

The question was taken, and it was decided in the affirmative—yeas 71, nays 47.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

F. F. LOWE, *of California.*

California elected *three* representatives in 1861, when a special provision of statute provided that she should be entitled to *two* till a new apportionment should take effect. Claiming that the apportionment under the eighth census took effect at once, Mr. Lowe was returned to Congress as a third and additional representative. The committee held that the apportionment would not take effect till on and after the 3d day of March, 1863.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 14, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

The memorial is based upon the alleged right of California to three representatives in the present Congress. By the apportionment under the eighth census California is entitled to three representatives, and it is claimed by the memorialist that that apportionment applies to the present or thirty seventh Congress. By special provision of statute, enacted July 30, 1852, it was provided that California should have two representatives till a new apportionment should take effect. But that State, believing that the apportionment based on the eighth

census had already taken effect, did, at its general election held on the first Wednesday of September last, elect by general ticket three persons to represent her in the present Congress. Two of these persons were admitted to seats and qualified as members on the second day of the present term. The certificate of the third, the memorialist, was presented on the same day and referred to this committee, as was also his memorial on a subsequent day of the session. These documents are printed in Miscellaneous Documents, the certificate in No. 4, the memorial in No. 19.

The Constitution provides that representatives "shall be apportioned among the several States which shall be included within this Union according to their respective numbers;" and that "the actual enumeration shall be made within three years after the first meeting of Congress, and within every subsequent ten years in such manner as they shall by law direct." The census and apportionment thus connected together in the Constitution have been connected together in all subsequent legislation by Congress. It has been the course of legislation, up to the year 1850 and the taking of the seventh census, to provide for the taking of each census by special act, and immediately upon its completion by a like special act to determine the number of representatives, and apportion the same among the several States according to such census. But in providing for the taking of the seventh census in 1850 Congress undertook to establish a permanent system both for the taking of all future censuses and for all future apportionments.—(Statutes at Large, vol. 9, page 428.) That statute requires that the census shall be taken and returned to the Secretary of the Interior on or before the first day of November next ensuing the twenty-third day of May, 1850, the date of the act. The statute then provides, section 23, "If no other law shall be passed providing for the taking of the eighth or any subsequent census of the United States on or before the first day of January of any year, when, by the Constitution of the United States, any future enumeration of the inhabitants thereof is required to be taken, such census shall in all things be taken and completed according to the provisions of this act." No other provision for the eighth census has been made.

The statute then proceeds to provide, before the census is taken, for the then next apportionment to be based upon the census not yet taken, and for all further apportionments, as follows:

SEC. 25. From and after the third day of March, 1853, the House of Representatives shall be composed of two hundred and thirty-three members, to be apportioned among the several States in the manner directed in the next section of this act.

SEC. 26. So soon as the next and each subsequent enumeration of the inhabitants of the several States, directed by the Constitution of the United States to be taken, shall be completed and returned to the office of the Department of the Interior, it shall be the duty of the Secretary of the Interior to ascertain the aggregate representative population of the United States, by adding to the whole number of free persons in all the States, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons; which aggregate population he shall divide by the number, two hundred and thirty-three, and the product of such division, rejecting any fraction of a unit, if any such happen to remain, shall be the ratio or rule of apportionment of representatives among the several States under such enumeration; and the said Secretary of the Department of the Interior shall then proceed in the same manner to ascertain the representative population of each State, and to divide the whole number of the representative population of each State by the ratio already determined by him as above directed; and the product of this last division shall be the number of representatives apportioned to such State under the then last enumeration: *Provided*, That the loss in the number of members caused by the fractions remaining in the several States, on the division of the population thereof, shall be compensated for by assigning to so many States, having the largest fractions, one additional member each for its fraction as may be necessary to make the whole number of representatives two hundred and thirty-three: *And provided also*, That if, after the apportionment of the representatives under the next or any subsequent census, a new State or States shall be admitted into the Union, the representative or representatives assigned to such new State or States shall be in addition to the number of representatives herein above limited; which excess of representatives over two hundred and thirty-three shall only continue until the next succeeding apportionment of representatives under the next succeeding census.

SEC. 27. When the Department of the Interior shall have apportioned the representatives in the manner above directed among the several States under the next or any subsequent enumeration of the inhabitants of the United States, he shall, as soon as practicable, make out and transmit, under the seal of his office, to the House of Representatives a certificate of the number of members apportioned to each State under the then last enumeration; and shall likewise make out and transmit, without delay, to the executive of each State a certificate, under his seal of office, of the number of members apportioned to such State under such last enumeration.

The claim of the memorialist is, that though the statute provides, "section twenty-fifth," that the apportionment based upon the census then about to be taken should take effect from and after the 3d day of March, 1853, it makes no provision that the next apportionment thereafter shall take effect in ten years from that date, viz: from and after the 3d March, 1863, or with the commencement of the thirty-eighth Congress; but having based it upon the census which it provides shall be completed and returned to the Secretary on or before the 1st day of November, 1860, and having also provided that "as soon as" that census has been so returned, the secretary shall, by a given rule of arithmetic, apportion the members among the several States, and shall, "as soon as practicable," transmit a certificate thereof to the House of Representatives, and shall transmit, "without delay," a like certificate to the executive of each State, it follows, as a necessary conclusion of law, that all this is to be done before the 4th of March, 1861, when the thirty-seventh or present Congress commenced; or whether the certificates to the House of Representatives and the several executives were actually made out before the fourth of March following or not. The right of representation based upon that census depends not upon the *certificate*, but upon the *fact* of enumeration, which the law provides shall be completed by the first of November preceding the commencement of the present Congress. And therefore it is that the memorialist claims that California has a right to elect three representatives to this Congress, that being the number which said enumeration shows she is entitled to, and that he is consequently entitled to the seat.

The claim of the memorialist is based upon a strict and, as it appears to the committee to be, a too narrow construction of the act of 1850. It was the intention of that act to establish a system for the taking of the census, and the consequent apportionment of representatives not only for the decade covered by the seventh census and apportionment, but for the eighth and each subsequent one. And the perusal of the statute, as a whole, cannot fail to leave the conviction that each subsequent census and apportionment should be made precisely as was provided in that statute for those then about to be made. The statute provides, first, that the eighth and any subsequent "census shall, in all things, be taken and completed according to the provisions of this act." It then provides that "so soon as the next (1850) and each subsequent enumeration of the inhabitants of the United States, directed by the Constitution of the United States to be taken, shall be completed and returned to the office of the Department of the Interior, it shall be the duty of the Secretary of the Interior" to make the apportionment by the rule already quoted. It is plain, therefore, that the same law is to apply to the future as to the then present census and apportionment. Now, it was fixed in the twenty-fifth section of the act that the apportionment founded upon the seventh census should take effect "from and after the third day of March, 1853." If, therefore, all future enumerations and apportionments were to be taken and made according to the provisions of that act, it would seem to follow very clearly that the time the apportionment after the eighth census should take effect must correspond to that fixed for the seventh, viz: from and after the third of March, 1863, as that had been fixed to take effect "from and after the third of March, 1853."

It is to be observed that there is no time *expressly* provided in the statute when the eighth census shall be commenced or completed. The statute provides, (section 23,) as has already been quoted: "If no other law be passed

providing for the taking of the eighth or any subsequent census of the United States, on or before the first day of January of any year, when, by the Constitution of the United States, any future enumeration of the inhabitants thereof is required to be taken, such census shall, in all things, be taken according to the provisions of this act." Now, the memorialist and all others say rightly that, by virtue of this provision, the eighth census was to be taken, commencing on the first day of June and ending on the first day of November, 1860. But they do not find those dates fixed in the statute under examination, or any other. They find in this statute that the *seventh* census shall be taken, commencing on the first day of June and ending on the first day of November, 1850; and they properly infer that the statute applies to the next census, *mutatis mutandis*. That is, if the eighth census is to be taken in 1860, the first of June, 1850, and the first of November, 1850, in the act must be read the first of June and November, 1860, the corresponding time as applied to the next census. It is by no other rule of construction that the memorialist can say that the statute of 1850 requires the census of 1860 to be completed by the first of November of that year. By the same rule will the apportionment based upon this census be found to take effect from and after the third day of March, 1863. Section 25 provides that "from and after the third day of March, 1853, the House of Representatives shall be composed of 233 members, to be apportioned among the several States in the manner directed in the next section of this act." The next section provides as follows: "So soon as the next *and any subsequent* enumeration of the inhabitants of the several States directed by the Constitution of the United States to be taken shall be completed and returned into the office of the Department of the Interior, it shall be the duty of the Secretary of the Interior to ascertain," &c. It is from the clause "and any subsequent enumeration," alone, that the present apportionment has been made. Now, by applying the rule just stated, if the apportionment based upon the census of 1850 was to take effect in 1853, by virtue of the same provision for apportionment, or that which provides an apportionment based upon the census of 1860, then, *mutatis mutandis*, the latter must take effect in 1863. Without this rule of construction the apportionment, as well as the census of 1860, upon which it is based, would be without any time fixed for it to go into operation.

There seems to be no reason for two different rules. So far as the committee have been able to ascertain from the cotemporaneous history, or the discussions in either house on its passage, or any subsequent criticism of it, till the present case has arisen, the idea never occurred to any one that it provided, in this regard, one rule for the census of 1850 and consequent apportionment, and a different one for any subsequent census and apportionment. On the other hand, there is much reason, if not constitutional obligation, that the rule should be the same for all, and that the last apportionment having been fixed to take effect "from and after the third day of March, 1853," the next should not take effect till ten years thereafter, or from and after the third day of March, 1863. The apportionment must follow and be based upon the census. The Constitution says representatives shall be apportioned among the several States "according to their respective numbers;" and to ascertain these numbers the same section provides that "the actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct." The Constitution evidently contemplated a census *only once* in ten years, and consequently a new apportionment based upon such census only once in ten years. The time when the first census should be taken was not fixed, only it must be "within three years after the first meeting of the Congress of the United States." Now, Congress did provide for taking the first census in 1790, the next in 1800, and in 1810, and in 1820, 1830, 1840, and 1850. So Congress has also provided by legislation, once in every ten years, that the apportionment, based

upon each one of these enumerations, respectively, shall take effect "from and after the third day of March, 1793," "from and after the 3d day of March, 1803," and from and after the same day in 1813, 1823, 1833, 1843, and 1853. In the absence of express enactment to the contrary, the committee cannot doubt that it was likewise the intention of Congress, in providing for the eighth census, to provide that it shall be taken in 1860, and that the apportionment based upon it, like all that had preceded it, should take effect in the corresponding year, viz: from and after the 3d of March, 1863. If it be held that apportionments of representatives cannot be made oftener than a federal census is taken, and that the Constitution requires that that shall be taken only once in ten years, then it follows that the apportionment based upon the census of 1860 cannot take effect till the 4th of March, 1863; else the period between the last two apportionments would be eight instead of ten years, while the period between all the rest would be ten years.

All construction of the constitutional obligation upon Congress to provide by law for the several "enumerations," and the apportionments based upon them, is uniform, and the course of legislation is without any conflict, all uniting in forcing upon the committee the construction they put upon this statute, that its intendment is that the apportionment based upon the census of 1860 shall take effect from and after the 3d of March, 1863.

The construction contended for by the memorialist, that this apportionment took effect from and after the 3d of March, 1861, requires that, between the 1st of November, 1860, when the census was by law to be completed and returned to the Secretary of the Interior, and the 3d of March following, the entire work of the Census bureau should be so far completed as to furnish the aggregate of free and slave population in each State, the ascertainment of the ratio and the actual apportionment of the number of representatives to each State, the notification by the Secretary of the Interior of the House of Representatives and the several State executives of the number each State is entitled to, the meeting of the legislatures of each State, and the dividing each State into districts, and the holding of elections for representatives in those several districts. All this must have been done before the 4th of March, 1861, or there could have been no Congress in existence on that day for the President to have called together in extra session, whatever may have been the public exigency. The committee do not say that all this is impossible; but it must be borne in mind that the legislatures of many of the States hold no regular sessions between the 1st of November and the 1st of March, and that the time for the election of representatives in Congress is fixed previous to the 1st day of November, and in some by the State constitution itself. In point of fact, in several of the States, in accordance with their laws and constitutions of long standing, representatives had been elected to the present Congress before the 1st of November, 1860, and, of course, according to the apportionment which took effect "from and after the 3d of March, 1853," eight years only of which had expired on the 3d of March, 1861.

In view of all this, which the construction of the statute claimed in behalf of the memorialist requires to be done between the 1st of November and the 4th of March following, this overturning of all the usages of the government from its foundation, the committee ask the question if the makers of this statute intended that this apportionment should take effect from and after the 3d day of March, 1861, would they have failed to have so expressly enacted? Would so radical a change have escaped notice in passing its various stages in each house? Would it have failed to have provoked opposition from those States upon which it imposed the necessity of calling special sessions of their legislatures, altering their constitutions and laws? Or would its authors and advocates have omitted commendation of this new feature in the legislation of the country? What if, by negligence or accident, the returns which the law requires to be made on the

first day of November do not, in fact, reach the Secretary of the Interior before the 4th of March following? What will be the condition of things then, if the construction contended for be the true one? The nation would be without a Congress, and the States without the power to elect one. It will be seen by a letter from the Secretary of the Interior, which accompanies this report, that the final returns were not received at his department till the 16th day of March, 1861. Can it be held, except on express enactment, that Congress overlooked such a contingency? If it be said that the requirements of the statute that the census shall be returned on the "*first day of November*," and that the Secretary shall make the apportionment "*so soon as*" the census is returned, and shall make out the certificate thereof to the House "*as soon as practicable*," and to the State executives "*without delay*," are all express enactments, showing that the apportionment is to take effect on the 4th of March following, rather than two years thereafter, the answer is, that these same enactments apply equally to the apportionment based upon the census of 1850, which, by the express terms of the statute, was not to take effect on the 4th of March following, but two years thereafter, on the 4th of March, 1853.

But this Congress has, by positive enactment, declared when, in its opinion, the apportionment based upon the census of 1860 shall take effect. In an act passed only the last month, to modify that apportionment and give to several States therein named a greater number of representatives than the apportionment under the statute of 1850 had given them, Congress has expressly enacted that the act shall take effect from and after the third day of March, 1863. The following is a copy of the act:

AN ACT fixing the number of the House of Representatives from and after the third of March, 1863.

Be it enacted, &c., That from and after the third day of March, eighteen hundred and sixty-three, the number of members of the House of Representatives of the Congress of the United States shall be two hundred and forty-one; and the eight additional members shall be assigned one each to Pennsylvania, Ohio, Kentucky, Illinois, Iowa, Minnesota, Vermont, and Rhode Island.

This act passed both houses in its present form without a division, and is therefore a unanimous declaration of the law-making power that the apportionment based upon the census of 1860 does not take effect till "from and after the 3d of March, 1863."

There is one consequence of giving effect to the claim of California to be represented in the present Congress according to the apportionment based upon the census of 1860 to which it is proper that attention should be called. If California is entitled to representation in accordance with that apportionment, every other State has the same right. There can be no such thing as one State represented according to one apportionment and under one census, and another State according to some other apportionment based on another census. The whole number of representatives and the number for each State are both fixed by law and by the same law. There cannot be one law for one State and another for another. If, therefore, California has a right to one more representative in this Congress under the new apportionment, Illinois has a right to five more, Iowa to four more, Wisconsin to three more, some other States to two, and others to one more, and a corresponding number must be retired from other States. Two members now serving in this house from Ohio, one from Kentucky, one from Massachusetts, and others from other States, must retire to make room for these new members. Which two of the twenty-one members from Ohio must retire? No particular two are less elected than their nineteen colleagues. Ohio elected twenty-one, when she was by the new apportionment entitled to but nineteen; but which two she would have repudiated she has not indicated. The whole twenty-one must therefore retire, and she must elect nineteen anew. So of all other States now represented here in excess of their

number under the new apportionment. Such an operation would work a disso lution of the present house preparatory to its reorganization under the new apportionment, to which California has alone conformed. A construction of the statute which would lead to so serious a result should not be arrived at hastily.

California has been misled in this matter by nobody but herself. By a copy of the certificate to her governor, made out by the Secretary of the Interior, and which is annexed to this report, it will be observed that the Secretary notifies her governor that he has apportioned to that State three representatives for the 38th Congress. Although this did not alter her legal rights, it nevertheless furnished her in advance with the construction of the statute by the only person authorized in the first instance to construe it, and which the committee believe to be the only true construction of it.

The memorialist urged upon the committee other considerations, for the purpose of showing that California was in *equity* entitled to a third representative, even under the apportionment based upon the census of 1850. It never could be ascertained by that census what was the actual number of inhabitants in that State in 1850. A portion of the census papers were accidently burned in the great fire of that year in San Francisco, and were never returned to the Secretary of the Interior. Large settlements were omitted altogether from the enumeration, under the mistaken belief that they fell within the Territory of Oregon. The vast extent of territory sparsely settled, in some parts by miners almost hidden among the mountains, and the small remuneration to the marshals for this service, were thought very much to corroborate the statement of the marshal and others, that the number returned fell short of the true number by from thirty to fifty per cent. The apportionment based upon the returns actually made gave California but one representative with a fraction. Congress, in 1852, before the apportionment took effect, in justice to California, undertook to remedy this defect by an act reciting these considerations just stated, and providing that the State should be entitled to two representatives till the next enumeration. The memorialist urged upon the committee that full justice was not done California at that time, and that she was actually entitled to three. The whole vote of the State at the presidential election in 1852 was 74,736. Adopting any ratio between voters and population, or even a much smaller one than is adopted in the older States, and there would have been population enough for three representatives. The State census of 1854, which was only approximate, gave 264,435—only 14,000 less than enough for three representatives. The vote of California in 1861 was 118,840, giving evidence of a much larger population than by either apportionment is represented in Congress. But all these considerations, though deserving of much weight, if it were the province of the committee to fix an apportionment act, cannot be taken into account by a Committee of Elections seeking to determine who has been actually elected according to the laws as they exist. The committee recommend the adoption of the following resolution:

Resolved, That F. F. Lowe is not entitled to a seat in this house as a representative from the State of California in the thirty-seventh Congress.

The House agreed to the resolution without division. An amendment declaring Mr. Lowe entitled to the seat was rejected—ayes 49, nays 69.

NOTE.—Mr. Dawes presented the case to the House, and the report was controverted by one member, viz., Mr. Phelps, of California. The speeches of Mr. Dawes and Mr. Phelps are in vol. 487 Congressional Globe, pages 1967 and 1969.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

FOSTER, *of North Carolina.*

Where there was a total lack of conformity to law, and no pretence of a general participation of the voting population in the election, it was treated as a nullity.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 16, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

That they have had the subject-matter of said memorial under consideration, and have fully heard Mr. Foster in support of his claim. No one of the memorialists has appeared before the committee. As all the evidence in support of this claim consists of the aforesaid memorial, which is printed in Mis. Doc. No. 53; a copy of what purported to be a memorial of thirty citizens of Carteret county, "ratifying and approving" the election of the claimant; a copy of a resolve in favor of the same claim, purporting to have been adopted by citizens of Craven county, which latter papers accompany this report, and what was said by Mr. Foster himself in support of his own claim, the committee deemed it best that the House should have the benefit of the latter also. They therefore employed a stenographer; and all that Mr. Foster offered to the committee in support of his claim accompanies this report. Therefore the entire claim rests upon what may be found in said Mis. Doc. No. 53, and the papers accompanying this report. It appeared so plain to the committee that the memorialists and Mr. Foster himself had failed to show the slightest foundation for this claim that nothing more than a brief statement of it is deemed necessary. This is the fourth time that Mr. Foster has claimed to have been elected a representative to the thirty-seventh Congress from the State of North Carolina—twice from the first and twice from the second district. On the eighteenth day of December last the House adopted without division the following resolution:

Resolved, That Charles Henry Foster is not entitled to a seat in this house as a representative in the thirty-seventh Congress, either from the first or from the second district of North Carolina.

The present claim is based entirely upon proceedings which have transpired since that date. Those proceedings consist of what purports to be a poll-list of eighty-one votes cast for Mr. Foster at Chickamacomico precinct on the 16th February last, supported by a copy of a paper purporting to be signed by thirty citizens of Carteret county, "ratifying and approving" said election, and a copy of a resolution of like purport, supposed to have been adopted by some citizens—how many it is not known—of Craven county. The other voting presented to the committee were proceedings upon which a former election was claimed, which claim was unanimously rejected by the House.

The second district of North Carolina is composed of the counties of Wayne, Edgecomb, Green, Pitt, Lenoir, Jones, Onslow, Carteret, Craven, Beaufort, and Hyde, and usually casts about nine thousand votes. The regular day of election was the first Thursday in August, 1861. There was no election for members of Congress held on that day, because the whole State was at that time in the armed occupation of rebels. Since then some portions of it have been reclaimed and the authority of the government asserted therein. The single voting place of Chickamacomico, where alone was any evidence of voting at this election, is in that part of Hyde county which is called Hatteras Banks. The claimant admits that voting in any other precinct in the district would be impossible, because every other precinct was either in the armed occupation of the rebels or under the control of our own army, whose commanding general had forbidden political meetings altogether. And even there the claimant knew of none who would have voted if an opportunity had offered. This voting Chickamacomico was without the slightest authority of law. No election been called. No writ of election had been issued. There was no gover the State, provisional, military, or of any other character, but the rebel ernor, to issue one.

The memorial of thirty names, purporting to be of citizens of Carteret county ratifying and approving of such an election, was of an anomalous character. The paper presented to the House was a copy. The committee called for the original, and when produced it was found to be, except the names, in the handwriting of the claimant himself, to be without date, and the names themselves to be written, many of them, in one handwriting, though not that of the claimant. His account of this paper was, that it was prepared by him for, and handed to the man whose name was first upon it; that it was returned to him some time in May of the present year by the editor of the Newbern Progress, who appeared to have been a Massachusetts volunteer, detailed from the 25th regiment of that State to edit a paper at Newbern. In what manner the names were obtained upon it the claimant did not know. The original of the resolve, purporting to have come from citizens of Craven county, the committee have never seen, and they are entirely ignorant of the number, character, or residence of the persons who adopted it.

This is the whole of the case. It is difficult to understand how any one can, seriously and in good faith, claim this to be an election of a representative to the thirty-seventh Congress. The committee have not deemed it necessary to add argument to a simple statement of the facts. They unanimously recommend the adoption of the following resolution:

Resolved, That Charles Henry Foster is not entitled to a seat in this house as a representative from the second district in North Carolina.

The House adopted the resolution without division or debate.

THIRTY-SEVENTH CONGRESS, SECOND SESSION.

JOSEPH SEGAR, *of Virginia.*

The Wheeling convention having provided for an election to Congress while the legislature was in session held that its functions ceased the moment that it had inaugurated the new government, and that it was the province of the legislature to provide for the election, the constitution not fixing the day.

Where there was a want of conformity to law in conducting the election, and a large portion of the district was in armed occupation by the rebels so that but one poll was open, held that the election was not valid.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 20, 1862.

Mr. DAWES, from the Committee of Elections, made the following report:

That they have had the subject-matter of said memorial under consideration, and have considered such testimony and such views in its support as the memorialists desired to offer. An argument addressed to the committee, through its chairman, may be found, printed by order of the House, in Mis. Doc. No. 29, of the present session. The committee find the following facts: A convention assembled at Wheeling, in the State of Virginia, on the 11th of June last, in which were represented, it is believed, thirty-nine counties of the State, situate in what is known as Western Virginia. This convention adopted on the 19th of June "an ordinance for the reorganization of the State government," after having declared that, because of the treasonable practices and purposes of the State convention lately held in Richmond, and of the executive of the State in connexion therewith, "the offices of all who adhere to the said convention and executive, whether legislative, executive, or judicial, are vacated." By the same ordinance a legislature, or general assembly, for the State of Virginia was created, and required to "assemble in the city of Wheeling on the first day of July, and

proceed to organize themselves as prescribed by existing laws in their respective branches." Said convention subsequently elected a governor for the State of Virginia, who still holds the office thus conferred upon him.

The legislature thus created assembled as required, and passed many enactments for the whole State of Virginia, elected two United States senators, who were admitted to seats in the Senate, and assumed all the functions of the general assembly of Virginia under its pre-existing constitution and laws. The convention which created and set in motion this new government did not, however, dissolve itself upon the assumption of the several functions of government by the executive officers and general assembly which, in the exercise of provisional powers, it had itself brought into being, but continued to hold its meeting after the assembling of the legislature, and to share with it in ordinary legislation for the whole State. The legislature was in session till the 24th of July, and how much longer the committee are not informed. The convention was in session on the 20th of August, and on that day passed an ordinance providing for the election of representatives in Congress in each district where, from any cause, such election was not held on the fourth Thursday in May last, the day provided by law for such election, and also "in the eleventh district, where a vacancy now exists, an election for such representative shall be held on the fourth Tuesday in October next, which shall be conducted, and the result ascertained, declared, and certified, in the manner directed in the second edition of the Code of Virginia." The governor thereupon, on the 12th day of October, issued the following proclamation:

THE COMMONWEALTH OF VIRGINIA.

EXECUTIVE DEPARTMENT, *Wheeling, October* 12, 1861.

To the people of Virginia:

Whereas several of the congressional districts of this State are unrepresented in the House of Representatives in the Congress of the United States, by reason of failure to elect on the fourth Thursday in May last, caused by armed men in rebellion against the Constitution and laws of the United States and of this State; and it being the right of the loyal inhabitants in each district to be represented in said House by a representative of their own appointing, the convention of Virginia, on the 20th day of August, 1861, passed an ordinance directing an election to be held on the fourth Thursday in October instant, (24th,) in every district of the State so unrepresented and where vacancies exist. It is further made the law, by virtue of the ordinance aforesaid, that any person who is prevented from attending such election, by reason of the occupation of his own county by armed men in hostility to the government, that such voter may vote anywhere in his congressional district. It is further ordained that the election shall be conducted, and the result ascertained, declared, and certified, in the manner directed in the Code of Virginia of the edition of 1860. By the 11th section of chapter 7th of that code any two freeholders may hold an election directed by law at any place of voting, if no commissioner to superintend the same appears and is willing to act, or if no commissioner have been appointed to hold the election.

Now, therefore, in consideration of the premises, I, Francis H. Pierpoint, governor of the Commonwealth of Virginia, hereby entreat the loyal voters of this State to hold elections in their several districts on the day above mentioned, to the end that the people may be represented, the principle of representative government sustained, and the State have her due weight in the national legislature.

F. H. PIERPOINT.

It is by virtue of an alleged election held in conformity with this proclamation that the memorialist claims the seat. The only evidence of his election, presented by the memorialist on the first day of the present session when he applied for admission, was the following certificate:

In conformity with the proclamation of Francis H. Pierpoint, governor of Virginia, a copy of which is herewith attached, an election was duly held for a representative in the first congressional district at Hampton, Elizabeth City county, State of Virginia, on Thursday, the 24th day of October, 1861.

The following is a duplicate copy of the return of the votes cast at said election:

Poll opened at Hampton, Elizabeth City county, Virginia, for the election of member of Congress from the first congressional district of Virginia, October 24, 1831.

Names of voters.	Candidates.		Names of voters.	Candidates.	
	Segar.	Jacobs.		Segar.	Jacobs.
J. S. Moody	1		Jacob Miller	1	
K. Whiting	1		John Watson	1	
Harvey Robbins	1		James E. Howell	1	
William Stacey	1		S. Kelly	1	
William Howell	1		James Latimer	1	
Levi Dunn	1		Willis Wilson	1	
Henry House	1		William Bartlett	1	
Henry Whitaker	1		Solomon D. Myster	1	
Thomas Watson	1		Samuel Watson	1	
Parker Millson	1		John McCunn	1	
John Showard	1		Theodore Tennis	1	
William J. Burdick	1		Thomas Dobbins	1	
Milton R. Muzy	1				

I certify that the above is a correct register of the votes polled at Hampton, Virginia, this twenty-fourth (24th) day of October, 1861.

ALEX. WORRALL, *Clerk.*

We, the undersigned, freeholders of Elizabeth City county, State of Virginia, do hereby certify that the above election was conducted agreeably to the call of F. H. Pierpoint, governor of the State of Virginia, by proclamation issued the twelfth (12th) day of October, A. D. 1861.

THOMAS DOBBINS.
T. S. TENNIS.

I hereby certify that the above Thomas Dobbins and Theodore S. Tennis were duly sworn by me as judges of election, held at Hampton, Elizabeth City county, State of Virginia, this twenty-fourth (24th) day of October, 1861

CAPT. N. M. BURLEIGH,
Provost Marshal at Camp Hamilton.

Witness:
WILLIAM BARTLETT, *Teller.*

Upon a subsequent day of the session the memorialist presented the following proclamation of the governor, declaring him elected:

BY THE GOVERNOR.—A PROCLAMATION.

Whereas the people of Virginia, in convention assembled at Wheeling, on the 20th day of August, 1861, did ordain "that in every congressional district where, from any cause, an election of representative in the Congress of the United States was not held on the fourth Thursday in May last, an election for such representative shall be held on the fourth Thursday in October next, which shall be conducted, and the result ascertained, and certified, in the manner directed in the second edition of the Code of Virginia:"

And whereas, in pursuance of said ordinance, an election was held in the first congressional district of Virginia, composed of the counties of Middlesex, Westmoreland, Richmond, Essex, Northumberland, King and Queen, Lancaster, Gloucester, Matthews, James City, the City of Williamsburg, New Kent, York, Warwick, Northampton, Accomac, and Elizabeth City, on the twenty-fourth day of October, 1861, at which a majority of the votes cast were given for Joseph Segar, esq.:

Now, therefore, I, Francis H. Pierpoint, governor of the Commonwealth of Virginia, do declare, by this my proclamation, the said Joseph Segar, esq., duly elected to represent the first congressional district of Virginia in the thirty-seventh Congress of the United States of America.

Given under my hand and the great seal of the Commonwealth, at Wheeling, this 20th day of December, in the year of our Lord one thousand eight hundred and sixty-one, [L. S.] and in the eighty-sixth year of the Commonwealth.

FRANCIS H. PIERPOINT.

By the governor:
L. A. HAGANS,
Secretary of the Commonwealth.

He also, at the same time, presented the proceedings of a meeting held in Chincoteague Island, in said district, on the 10th of December, in which one hundred and thirty-six citizens expressed their preference for him as a representative in Congress by formally voting for him on that day. For this last proceeding, however, he claimed only the force of an expression of opinion. These last-mentioned papers were also referred to the committee. The memorialist bases his claim entirely upon the twenty-five votes cast for him at Hampton on the 24th day of October, according to the certificate of the freeholders already quoted. He asserts his claim to be a strictly legal one. That the votes cast for him were cast by legal voters in all respects in conformity with law; and that the only inquiry open to the committee or the House, beyond this conformity with the law, is, did the memorialist receive more votes than any other person? And it is not to be inquired how many votes were cast except to settle the question of a majority, for that all who do not vote are presumed to assent.

The committee have been led to investigate this claim of legality. The whole authority for this election is the ordinance of the Wheeling convention passed August 20. Assuming that the proceedings of that convention, and of the legislature and executive created by it, have ripened into a State government, legal in all respects, still the question arises, was it one of the functions of that convention to provide for the time, place, and manner of electing representatives in Congress, especially after the legislature had assembled? The purpose of that convention was the creation of a new State government. The only basis upon which it rests is necessity.

A new government must begin somewhere, and there must be somebody to make it. As necessity was the foundation, so also it was the limit of the power called into being for the sole purpose of inaugurating a new government. It could do anything necessary to carry out that purpose, and when that was done it could do no more. Its functions ceased the moment the new government took on form and life. The two cannot, in the nature of things, exist and move *pari passu*. Now, long before this ordinance had passed the convention, there was in existence a governor and a legislature having all the powers that a governor and legislature could have in Virginia—that is, all the powers which the constitution of Virginia clothes a governor and legislature with, not in conflict with the Constitution of the United States. Now, this latter instrument provides (art. 1, sec. 4) that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the *legislature thereof*." It is a legislative act. It is a *law*. And the constitution of Virginia provides (art. 3, sec. 10) that "all laws shall originate in the house of delegates, to be approved or rejected by the senate, or to be amended with the consent of the house of delegates." Whatever necessity may require when there is no house of delegates, when there is one, all laws *shall* originate in it. They cannot originate anywhere else. If the time had been fixed in the constitution of the State, recognized and acquiesced in by the legislature, it may be said to be the act of the law-making power—a legislative act. But this time and manner were not fixed in the organic act, nor by the legislature, but by the convention assuming legislative functions in the presence of the legislature itself.

Again: the ordinance itself proposes to conform this election to the Code of Virginia. It "shall be conducted, and the result ascertained, declared, and

certified in the manner directed in the second edition of the Code of Virginia." Has the election under consideration been conducted in all respects according to the requirements of the Virginia code? Title 3, chapter 7, section 11, of that code provides for elections to fill vacancies in Congress, and enacts that they "shall be superintended and held by the same officers, under the same penalties, and subject to the same regulations as are prescribed for the general elections." Section 12 of the same chapter provides that "a *writ* of election shall be directed to the sheriff or sergeant of the county or corporation for which the election is to be held; or if the election is to be held for an election district, or to fill a vacancy in the Senate or in Congress, to the several sheriffs and sergeants of the counties and corporations which, or any parts of which, are included in the district. It shall prescribe the day of election, (to be the same throughout the district,) and may fix a day on which the officers conducting the election are to meet to make returns, not later than that fixed by law in the case of a regular election."

Now, in the present case there is nothing which answers to a *writ of election*. The only paper originating this election is the proclamation of the governor, of October 12, already copied into this report. This proclamation can be considered in no sense a writ of election. It commands nobody—no authorized officer—to hold an election. It only "entreats the loyal voters" to hold an election, and is addressed, not to sheriffs, &c., but "to the people of Virginia." This is no technical defect. The 13th section of the same chapter of the code provides something for the several officers to whom the writ is directed to do before the election can be held. That section is in these words:

> Each officer to whom a writ of election is directed shall give notice thereof, and of the time of the election, by advertisement at four of the most suitable places in his county or corporation.

The reason of this enactment is manifest. The law, which all are presumed to know, does not fix the time of holding a special election. It is done by the governor in his "writ of election," directed to the sheriff. This provision of law is necessary to insure notoriety, and it is made the duty of the sheriff, to whom the writ is directed, to do it in a particular manner. Now, this proclamation, if a writ, is directed to no sheriff.

The memorialist stated to the committee with great frankness that there was no election held at any other precinct in the district, except Hampton, for the reason that all other parts of the district were at the time in possession of the rebel forces, and that notice, even of the election, could not pass beyond the enemy's lines to a single precinct in the district. He stated, further, that he understood that the notice reached Hampton through the agency of a gentleman, then stopping in this city, who at one time contemplated being a candidate, and who, observing the proclamation published in the National Intelligencer, communicated it by letter to some gentleman in Hampton. These statements, taken to be facts by the committee, show conclusively a failure to comply with the provisions of that section of the Virginia code touching notice to the electors of the district, to which attention has already been called. There are other provisions of the Code of Virginia, respecting the returns of votes and duties of certifying officers, which have been wholly neglected in this case.—(See title 3, ch. 8, sections 3 and 4.) But these latter are matters of form merely, to which the committee give very little weight in the conclusions to which they have arrived.

It is apparent, from what has been already said, that, if the claim of the memorialist rests exclusively upon a strict conformity with all the provisions of law, it cannot be maintained.

But the committee do not desire to rest their conclusions upon so narrow a basis. If the Union voters of the district had had an opportunity to choose a representative—if there had been no armed occupation of the district by rebels,

so that polls could have been opened at the various voting places in the district, and all who desired could have deposited their ballots, and had done so in conformity with the provisions of law, so far as the disturbed and abnormal condition of things would permit, the committee would have sought some way to give effect to such election. But enough of the facts surrounding this election have already been stated to show that such is not the case. There was but one single poll in the whole district opened, and but twenty-five votes cast. The reason why there were no other polls opened or more votes cast cannot be better expressed than by the three freeholders themselves who certify to this election. This is their language:

And we do further certify that there was no poll opened at any other precinct in said county; and that so far as we can learn and confidently believe, there was no poll opened or election held for member of Congress in any other county or city or town of said first congressional district, owing to the fact that all the other counties and election precincts of said congressional district were, on the 24th day of October last, within the lines and under the influence and control of the seceding and rebel States.

This state of things is no fault of the memorialist or the Union voters of the district; but it did exist on the day of this election. How can it be made to appear, then, that the memorialist is the choice of the district, or that if an opportunity had existed an overwhelming majority of votes would not have been cast against him? In what sense can it be said that those who did not vote are to be presumed to acquiesce, when they neither had the opportunity to vote, nor the knowledge that voting was going on? Acquiescence presumes liberty to protest. In this instance that liberty did not exist. The memorialist laid before the committee much gratifying evidence of the esteem in which he is held in the district, and the testimonials of patriotic gentlemen to his great sacrifices in behalf of the Union cause, and to the belief that he would be most acceptable to the Union voters of the district as their representative; but this testimony, however valuable to the memorialist personally, is not evidence of an election, and was not offered as such, but rather at the request of the committee itself.

In conclusion, the committee are, for the foregoing reasons, of opinion that the memorialist was not, by virtue of the votes cast for him at Hampton on the 24th of October last, elected a representative to this Congress from the first district in Virginia, and they accordingly recommend the passage of the following resolution:

Resolved, That Joseph Segar is not entitled to a seat in this house as a representative in the 37th Congress from the first district in Virginia.

Mr. DAWES opened the debate in the House with the subjoined correction of the report:

Mr. DAWES. Mr. Speaker, I desire to make two corrections in the report. At the hearing before the committee, the gentleman claiming the seat was unable to furnish the committee with the latest edition of the Code of Virginia, and the committee were at that time unable to possess themselves of it. It was his belief that the election laws of Virginia had not been materially changed from the code of 1849. In the belief that the election laws of Virginia conformed to the code of 1849, the committee have recited them as there found in the report. Since the report was made, however, the committee have been enabled to possess themselves of the edition of the laws of Virginia published in 1860, and find that there are two slight inaccuracies in the report in consequence of using the other edition. They do not, however, materially affect the conclusion to which the committee came; but for the sake of perfect accuracy they ought to be mentioned.

The committee incidentally remark in their report that the constitution of Virginia provides that all bills shall originate in the lower house of the legislature. That anomalous provision of the constitution of Virginia has since been changed, and now bills may originate in either house. Further, the committee, in reciting a section of the statute of Virginia requiring notices to voters in cases of all special elections, recited the section which they found in the old statute, which requires that the sheriff or sergeant, on receiving the writ of election from the governor, shall give four days' notice thereof to the voters of his precinct and throughout the district. It has been further, and with more care, provided in subsequent legislation that not only shall the sheriff or sergeant give four days' notice, but that he shall

give ten days' notice of election in the holding of every special election for member of Congress, and that he shall not only give that notice in four places, as was originally provided, but that he shall give it at every precinct throughout the district.

I will read the law as it now stands:

"Each officer to whom a writ of election is directed shall, at least ten days before such election, give notice thereof, and of the time of the election, by advertisement, at each place of voting in his county or corporation."

In point of fact, as is stated in the report, there was no notice of this election at any other point in the whole district, except at this place, where this one poll was opened; and it is stated as a reason, that notice was impossible at any other precinct in the district, because every other precinct in the district was in the armed occupation of the rebels.

Mr. SEGAR argued his own case at length. The subjoined extracts are from his speech:

There was, a little more than half a year ago, an extra session of Congress held at the Capitol. A Mr. Thayer had been returned from the State of Oregon, and was admitted as a member of this house. Mr. Shiel, my friend, who now occupies a seat here as the member from that State, contested the seat of the sitting member. Mr. Thayer came hither elected at an election called by the ordinary legislature of Oregon. Mr. Shiel contested under an election ordered by the convention of Oregon. It was decided by both the committee and the House that Mr. Shiel was legally entitled to the seat: that the previous election under the act of the convention of Oregon superseded the election under the act of the legislature of Oregon.

Mr. Shiel's case is identically the same as my own. I come here, as Mr. Shiel did, under an election ordered not by the ordinary legislature of Virginia, but by the highest legislative authority recognized in the land—by the people in convention assembled. I claim a seat from the high gift of the people of Virginia, who were acting in their sovereign capacity, under a convention of the people, which is superior in character to all other legislatures ever held or that could be held within her limits. Sir, that is my case precisely. My case and the case of Mr. Shiel are as parallel as mathematical parallel lines. I challenge my friend from Massachusetts [Mr. Dawes] to show the slightest, the faintest, the least want of analogy between the two cases.

But I know very well how the legal ingenuity of the gentleman from Massachusetts will essay to get over this difficulty in his way. He will say that the time and place for holding the election in the case of Mr. Shiel were fixed by the constitution of Oregon: that in that case it was a constitutional provision. In reply, I have this to say: if the power of a convention is so great that it can absolutely fix the time and place of election for all time, I wish to know whether it may not, at least, exercise the power of ordering at least a single election, as was done in my case. I submit this point for the gentleman's especial consideration.

Again:

I come now, Mr. Speaker, to another point in this case. I brought with me here *prima facie* evidence of my title to this seat, and that *prima facie* evidence has not been disproved. Now, I admit the right of the House to judge of the qualifications and returns of its members; but I presume that it will not be contended by the gentleman from Massachusetts [Mr. Dawes] that this power can be arbitrarily exercised. This house has itself a code of parliamentary law upon the subject, which is binding on this house itself and upon its committees. The House has fixed the whole law of election from 1794 down to the present time, and among the principles settled in that election code is this: that every man who comes here claiming a seat upon this floor, and presenting *prima facie* evidence of title to that seat, must be sworn in; and on this principle I ought to have been sworn in the very first day of the session. I presume that law will not be questioned. I will read to the House a simple extract from a celebrated case, which settles the principle I have named. I read from the case of Bassett *vs.* Bayley, which will be found on page 255 of the volume of Contested Election Cases:

"It is urged, on the other hand, by the sitting member, that, until disproved, the officers' return who conducted the election ought to be respected as *prima facie* evidence of the legality of the proceedings, and the committee are unanimously of this opinion."

There is a law laid down, "as plain as a pike-staff," as they say in my country, that every man who comes here with *prima facie* evidence of title is entitled to his seat until the return of the State officers is controverted and disproved; and if the chairman of the Committee of Elections can cite me to one solitary case in which a gentleman coming here and presenting the return of the returning officers of his State has not been allowed to take the oath and his seat, I will give the question up. There is no such case. The question, then comes up: Have I the return of the returning officers of my State? I will state to the House that the officers in Virginia authorized by law to make the returns in elections, and deliver to the candidate the evidence of his election, are the commissioners who conduct the election at the court-houses. This is not disputed. Sir, I have that certificate: I have the return prescribed by the laws of Virginia, and recognized in the proclamation of Governor Pierpoint: I have the return of the two freeholders who acted as commissioners; no commissioners ap-

pearing to open the polls, the law provides that any two freeholders may open the polls and hold an election. These two freeholders did open a poll; they took the poll according to law, and they certify the result according to law. I have here that return. My friend from Massachusetts has not done me the service to put that return in his report. I know that no injustice was intended, but it is a little singular that in his report he does not embrace the return, which is the gist of the whole thing. Its omission throws a doubt and darkness over the case, which will be utterly dispelled when the members of the House come to examine the return. I will read the conclusion of it only. The officers of the election, after stating the facts of the case, which are set forth in the report of the committee, among others, that the rest of the district was occupied by the army of the rebels, and therefore no election could be held elsewhere than at Hampton, conclude their certificate in these words:

"And we do further certify that at the election held in pursuance of the proclamation aforesaid, at Hampton, on this 24th of October, 1861, in the said county of Elizabeth City, which is one of the counties composing the first congressional district of the State of Virginia, Joseph Segar, esq., having received all the votes polled, was duly elected to represent the said first district in the Congress of the United States.

"Given under our hands and seals this 29th day of October, 1861.

"ALEXANDER WORRALL. [SEAL.]
"THOMAS DOBBINS. [SEAL.]
"T. S. TENNIS. [SEAL.]"

This return is in the very words prescribed by the act of assembly.

Mr. NOELL said:

* * * * A convention of the people of a State having authority not only to make rules of action which are binding upon the people of a State, but also authority to destroy or build up the ordinary legislative power of a State, is, within the meaning of the Constitution, and according to the construction I give it, a legislature in the strict sense of the term, both in the letter and spirit of that instrument.

It will be remarked that the Constitution of the United States does not undertake to define what shall be the character of the law-making powers of the States. Nowhere in the Constitution can a letter or word be found by which that instrument undertakes to limit or prescribe to the State governments the character and forms of their legal legislation. When a convention, selected by the people of the State, meets, they have the right to make not only organic laws which shall control the action of the legislature created by the instrument, which we call a constitution, but they have the right to make laws directly bearing upon individuals; and if the people of a State choose to do so, they could dispense entirely with the ordinary legislature, and this original, elementary convention has the power and right to make all laws governing them in their social and public and private relations.

Considering the clause of the Constitution in this light—and I think that is the proper construction to be given to it—the men who framed that instrument intended, as it was said in the report of the committee in the Oregon contested election case, to intrust to any regularly constituted law-making power, whether a convention of the people, or the ordinary legislature, the right to prescribe the time and place of holding congressional elections. The misapprehension upon that point arises from the failure to consider this clause of the Constitution, with reference to the elementary proposition that the Constitution does not undertake to say that the general assembly of Virginia shall prescribe the time and place of holding elections; that it does not undertake to say that the Senate and House of Representatives of Virginia shall perform that duty, but only declares that the legislature of Virginia shall do this thing. And what is the legislature of Virginia is the only question we are called upon to inquire into.

The convention of the people, then, held at Wheeling, having the power to prescribe rules of action—having the right not only to make laws, but to create and destroy the ordinary legislative power of a State, undertook to make an original provision fixing the time and place of holding this congressional election; and, according to the construction I give to this clause of the Constitution, that law is valid and binding upon the people of Virginia and upon this Congress.

The next inquiry to which we are to address ourselves, then, is this: have the people of that congressional district, and the authorities of the provisional government of Virginia, as established by the Wheeling convention, complied with the requirements of that ordinance? It is necessary for us to examine the phraseology of that ordinance; and I shall call the attention of the House to the peculiar language used in it with reference to the election now under consideration, and to another election ordered by the same ordinance. The first section of that ordinance is as follows:

"In every congressional district of the State where, from any cause, an election of a representative in the Congress of the United States was not held on the fourth Thursday in May last, (and in the eleventh district where a verdict now exists,) an election for such representative shall be held on the fourth Thursday in October next, which shall be conducted, and the result ascertained, declared, and certified in the manner directed in the second edition of the Code of Virginia."

What is the meaning of that ordinance? It declares that in each congressional district in that State where an election has not been held at the time previously fixed by the laws of Virginia, and in the eleventh district where a vacancy exists, the election shall be held at a certain time and place. Mark the distinction which the convention itself makes between the election in the congressional district where a vacancy existed by the election of Mr. Carlile to the Senate, and the other congressional districts in the State where no election was to take place as an original election.

Mr. WORCESTER. I would ask the gentleman if the people of the first congressional district of Virginia were ever represented in the Wheeling convention at all?

Mr. NOELL. I am not informed on that point; but I do not consider it material whether they were or were not.

Mr. WORCESTER. I understand that they were not.

Mr. NOELL. It was their misfortune, perhaps, and not their fault. Now, sir, this ordinance was adopted in the month of August, and in conformity with that ordinance the governor of the provisional government of Virginia—already recognized as a valid constitutional government by this house, by the Senate, and by every department of the government—issued his proclamation for the holding of an election at the time and places indicated in this ordinance.

An objection has been made here that no writ of election was issued, and that no notice was given of the time and place of election. Now, I wish particularly to direct the attention of the House to the principle involved in that matter. The clause of the statute of Virginia which has been read to the distinguished chairman of the Committee of Elections refers only to special elections to fill vacancies. The times and places of holding such elections are to be fixed by the governor, and consequently, the times and places not being fixed by any law, notice is required, in order that the people may be informed that such an election is to occur, and at that time.

What is the principle involved? Every man in the State is presumed to know and take notice of all the public laws of that State; but when you come to hold a special election at a time not fixed by any public law, the presumption does not exist, and hence the State of Virginia, and all other States, have required that, in such cases, the executive of the State shall issue his writ of election, and that these ministerial officers shall give these notices for the reason that there is nothing in the public laws of the State to notify the people that they will be called upon to exercise the privilege of voting at the time of the election. When we come to consider the statute in this light, the whole objection falls to the ground. What is the necessity of giving the people notice of a fact of which they, in the contemplation of law, have already notice? The proclamation of the governor was notice to all the world within the limits where his jurisdiction extended. The ordinance of convention adopted at Wheeling in August became a part of the public organic law of the State, and was notice to every man within the State.

But, sir, the citizens of my State have had some experience in these matters. I presume gentlemen from the northern States do not so well understand the necessity that devolves upon the loyal citizens of some of the border States to reach ends by means such as we resorted to in this case; but we who come from Missouri have had some experience in this matter. An attempt was made by a secessionist legislature and traitorous governor to take our State out of the Union, and a convention was called for that express purpose. That convention met in the spring of the year, considered the question, and decided to remain true to the Union. The same secession legislature, called together by the traitorous governor, made an attempt to carry the State out of the Union, in spite of the action of the convention. They passed a bill, known as Caleb Jackson's military bill, by which they provided that persons in the military service of the State should not take the oath to support the Constitution of the United States, and made other provisions that would enable the governor to use the whole military power of the State against the authority of the United States. Our convention was still in existence, though not in session. It was convened by its president, and met in the month of July. When the convention met, it deposed the traitor governor, deposed that legislature, and it replaced the military bill, and other odious measures that had been adopted by the secession legislature.

Now, when the legislature was thus deposed, there was no other constitutional legislative body existing in the State of Missouri except the convention; and the convention was not to pass laws precisely like an ordinary legislature. It repealed the military bill. Why? Because that bill was an obstacle in their way in accomplishing the object for which they had assembled, and that was to retain Missouri in the Union as one of the States of the Union. They set aside the traitorous governor and legislature of the State: they set aside that treasonable work, and went to work to put Missouri in her proper and true position. It is to that policy on the part of her convention that we are indebted to the loyal position of Missouri this day. So, when the convention met at Wheeling, they found that public men at Richmond had inaugurated the same system, had voted the State of Virginia out of the Union, and were endeavoring to carry it out at the point of the bayonet. It was necessary for the convention to organize some provisional government loyal to the Union, and that would remain in connexion with this government, and carry out the purposes for which the State became part of this great confederacy. What did they do? They were not, as the

gentleman from Massachusetts says in his report, called together there for the sole purpose of organizing a provisional government. A State exists only because it is a member of the Union, and not outside of the Union. They were there for another and a higher purpose, and that was to organize a provisional government, and keep up the connexion between the State of Virginia and this general government of ours. That was the object; and one of the instrumentalities necessary to effect that object was to bring about a connexion between the federal government and that provisional government by being represented in this house and in the Senate. They adopted proper and legitimate means to accomplish that purpose. They provided, by an ordinance, for the election of members of Congress. Something is said in the report with regard to the omission of the legislature, though still in existence, to provide for an election of members of Congress. The provisional legislature did not provide for it. The convention, finding this omission, went on and provided for it; and through that provision the members now upon this floor from Virginia obtained their seats here.

The next point in the case, Mr. Speaker, is the fact that most of the counties in this congressional district were occupied by hostile forces, and in consequence thereof the great body of the people had no opportunity to get to the polls. Now, I agree with the distinguished chairman of the Committee of Elections that a great principle is involved in this question, and I agree with him that it is important that we should decide it rightly, because it will be meeting us hereafter. The principle involved here lies at the foundation of our government; it is the principle upon which our government originated; the right to representation where men were taxed was the principle upon which our Revolution was fought. The colonies were taxed by the British Parliament, and were denied the privilege of being represented in that Parliament, and upon that great fundamental principle our government started out, and it has been conducted upon that principle ever since; and, sir, when you deny to the loyal men of a congressional district in any State in this Union—be they few or many—the privilege of having a voice upon this floor to be heard upon public measures, and particularly upon the tax bills which are to operate upon them, as well as upon all the rest of the citizens of the United States, you strike down the great fundamental principle for which our fathers fought in the Revolution. I say you undertake to deny them the privilege of being heard on this floor, and do so on the ground that, a portion of their territory being occupied by hostile forces, they were unable to go to the polls and hold an election, you strike down that great fundamental principle.

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Mr. CRITTENDEN. Mr. Speaker, I do not rise for the purpose of indulging in any general debate upon this subject, but merely for the purpose of making a suggestion in reference to one point of law presented in the report of the Committee of Elections as to the power of a convention to prescribe the times, places, and manner of holding elections for members of Congress. The point was made that this election was held under the order of a convention which was then held, and that the election was therefore irregular and void.

Mr. Speaker, this, at least, is a very nice distinction. The power with which a convention is clothed is the sovereign power of the people. The extent to which it may go, and the limits that divide it from the ordinary legislative power, is a very nice and uncertain one. Why cannot a convention consider the election of members of Congress as of importance enough to be regulated by the fundamental law of the land, and give to it a place in the constitution? And will not that, in a liberal and just sense, be a compliance with the provisions of the Constitution of the United States which requires that the rules and regulations for holding such an election in a State shall be prescribed by the legislature thereof? It is in the highest sense of the term, if we will not allow ourselves to be embarrassed by the names "convention" and "legislature"—it is, in the highest possible sense, the legislative power of the people.

But what was the object in putting this provision into the Constitution of the United States? It was to give to the States the power of regulating and conducting those elections. The use of the term "legislature," in that connexion, should, I think, be taken in the most broad and general sense. There ought to be no difficulty in a time like this in recognizing the authority of a convention in a matter of this description. It is a question which it seems to me should be decided by the proper authority of the State. In the Supreme Court of the United States the rule laid down and invariably followed is to go with the decisions of the State courts in the construction of State law. Else infinite difficulty will arise from the laws of the State being construed one way by the supreme court of that State, and another way by the Supreme Court of the United States. The Supreme Court of the United States have, in their wisdom, therefore, adopted the State construction of a State law.

Well, sir, in determining the question whether the act of the convention in this instance complies with the action of Congress and with the requirements of the constitution in regard to this election, it seems to me our construction of the law in this respect should follow the same principle. The judges of the courts are ordinarily the construers of law; but there are laws that require executive construction. The governor of a State is the authority in whom is vested the right of saying whether an election was legal and valid. If the election be held upon improper authority, or upon no authority, it is the duty of the governor to give no certificate. But the governor in this instance gave a certificate that this gentleman was legally elected. Now, shall we differ with him upon the question of a Virginia understand-

ing of a Virginia law as to what was a compliance with the requirements of the Constitution of the United States, as to whether a convention in a fair and liberal sense of the constitution was a legislature? Shall we undertake to overrule the decision upon a matter committed to him, after he has given, in accordance with the forms of law, under the broad seal of the State, a certificate under his authority that this gentleman was regularly and legally elected?

Mr. DAWES. * * * * * I have felt the importance of the case to be, perhaps, more than I supposed yesterday it would be in the power of the Committee of Elections, or of any one, to impress upon the House. Not, sir, because it involves the representation of a single district upon this floor, but because I have felt that it involves the representation of many districts upon this floor, and involves, perhaps, to some extent, a change in the nature and fundamental character of the House itself. I am gratified to feel, from the debate which has taken place, that the House is fully awake to the importance of the principle involved, and I have to regret, sir, that it has fallen to my lot, as the mouthpiece of the committee, to say what little is to be said in support of the conclusion of the committee, and to say it at the close of so long a debate as this, and after the House has necessarily become weary and tired of the case. I hope, however, that, as a matter of duty, if nothing more, the House will be patient with me, and, as far as they can, give me their attention while, as well as I can, I give such reasons as controlled the committee, and as still control me in the vote I shall be obliged to give upon this question.

As no one has spoken representing the conclusions of the committee, and as all the debate has been in behalf of the memorialist, it necessarily will be that whatever I shall say will be confined merely to a reply to such considerations as have been offered in his behalf. I hope to confine myself as closely as possible to these considerations; and if the House be not too much wearied I hope it will give me time enough to go through with them all.

A few of them, standing at the threshold of the case, have been offered just at the heel of the debate. Without regard to the order in which they have been presented, I feel bound to consider one or two offered in this case just at the close of the debate. The first was that offered by the gentleman from Tennessee, [Mr. Maynard,] that the House was bound to admit this man to his seat because he comes here with the certificate of the governor of Virginia under the broad seal of the State. That same consideration was also urged by the distinguished gentleman from Kentucky, [Mr. Crittenden.] Now, I am afraid, Mr. Speaker, from what I have heard from the speakers on behalf of the claimant, that members of the House do not understand the facts of this case. How can my friend from Tennessee or the distinguished gentleman from Kentucky say that we were bound to admit this man to a seat because he came here with the certificate of the governor under the broad seal of the State, when he came here with no such thing? I hold in my hand everything which he brought here when he asked to be admitted to a seat in this house, and when, instead of admitting him as we did those who came here with a certificate under the broad seal of the governor, the House referred his case to the Committee of Elections, with instructions to inquire into the merits of his election.

I say, Mr. Speaker, that the only paper this gentleman presented here, on the strength of which he asked to be sworn in and to take his seat, and on the strength of which the House referred the case to the Committee of Elections, was simply the paper which I hold in my hand. It is a certificate in these words:

"I certify that the above is a correct register of the votes polled at Hampton, Virginia, this 24th day of October, 1861.

"ALEX. WORRAL, *Clerk.*"

—

"We, the undersigned, freeholders of Elizabeth City county, State of Virginia, do hereby certify that the above election was conducted agreeably to the call of F. H. Pierpoint, governor of the State of Virginia, by proclamation issued the 12th day of October, A. D. 1861.

"THOMAS DOBBINS.
"T. S. TENNIS."

—

"I hereby certify that the above Thomas Dobbins and Theodore S. Tennis were duly sworn by me as judges of election held at Hampton, Elizabeth City county, State of Virginia, this 24th day of October, 1861.

"CAPTAIN N. M. BURLEIGH,
"*Provost Marshal at Camp Hamilton.*

"Witness:
"WILLIAM BARTLETT, *Teller.*"

The two men who held the election at Hampton, the place of residence of the memorialist, where he keeps a hotel, and where there were gathered together twenty-five votes for him in a box, certify to the fact that twenty-five votes were cast for him then and there. He took that certificate, brought it here, and asked to be sworn in. The House, in its wisdom, referred him and the certificate to the Committee of Elections, to inquire into the merits of that

election. The committee proceeded to discharge that duty. The claimant submitted to the committee the evidence on which he claimed his seat. He subsequently obtained from these men a codicil to their certificate. That codicil I will read to the House:

"And we do further certify that there was no poll opened at any other precinct in said county, and that so far as we can learn and confidently believe, there was no poll opened or election held for member of Congress in any other county or city or town of said first congressional district, owing to the fact that all the other counties and election precincts of said congressional district were, on the 24th day of October last, within the lines and under the influence and control of the seceding and rebel States; and we do further certify that at the election held in pursuance of the proclamation aforesaid, at Hampton, on the 24th day of October, 1861, in the said county of Elizabeth City, which is one of the counties composing the first congressional district of the State of Virginia, Joseph Segar, esq., having received all the votes polled, was duly elected to represent the said first district in the Congress of the United States.

"Given under our hands and seals this 29th day of October, 1861.

"ALEXANDER WORRALL. [SEAL.]
"THOMAS DOBBINS. [SEAL.]
"T. S. TENNIS. [SEAL.]"

Having procured this certificate and this declaration on the part of these three men that he had been elected, Mr. Segar takes it to the governor after he had had a hearing before the committee. The governor, on the strength of it, issued a paper, which is by the gentleman from Tennessee [Mr. Maynard] and by the gentleman from Kentucky [Mr. Crittenden] pronounced conclusive on this house.

Mr. CRITTENDEN. I did not hold that it was conclusive, but that there should be reasons shown why it should not be held as conclusive.

Mr. DAWES. With all due respect to my friend from Kentucky, I ask what are we doing now, if not seeing whether there is any reason why this certificate should not prevail? I trust that my friend does not apprehend that I would treat the governor of Virginia with anything but respect, or would not give all due weight to his certificate. But I propose now to look behind that certificate. The governor of Virginia has relieved me of all trouble, for he has recited that on which he bases his certificate. The claimant in this case has gone further, and has laid before the Committee of Elections the entire evidence on which the certificate is based.

* * * * * * *

Now, a new government has got to begin somewhere, and it might as well begin in a convention as anywhere else, and we have, so far as we were concerned, sanctioned this convention as the commencement of the new government of Virginia. But the government it sets in motion takes the place of the convention from the moment it is put in operation, *ex necessitate rei*. It is from the necessity of the case. It is limited by that necessity, and it has no authority to go one inch beyond it. Now, this convention set in motion a new government in Virginia. It elected a governor, and I consider him the governor of Virginia to all intents and purposes. It created a legislature. In other words, it overstepped the old legislature and provided for filling up the vacancies. Then it put this legislature—and I ask my friend from Kentucky [Mr. Mallory] to listen for a moment *in hæc verba*—and this government under the constitution of Virginia. It set them going and put them under the constitution of Virginia, and henceforth, if they were not false to their creation, they were to go along under that constitution; to do what the legislature assembled in Richmond did, and to do nothing more and nothing less; to do what the constitution of Virginia prescribes, and to refrain from doing what that constitution said should not be done. The legislature assembled, took upon themselves the form of law, and proceeded in the work of legislation. What occasion, then, in the necessity of the case, was there for the further existence of this convention?

My friend from Kentucky said that the convention went along side by side with the legislature, and what the legislature did not do the convention would do, and what the convention did the legislature would not do. He said that if the legislature had passed a law for the election of members of Congress, the convention would not then have had any authority to do it; and if the convention had done it, the legislature could not do anything in the matter. Here, then, are two separate co-existent supreme governments in the same State, and running at the same time, if I may be allowed the expression, neck and neck. Now I submit, that the moment the legislature was called into existence, and everything properly belonging to it provided, there being no authority in the constitution for any other body of men to do the legislation, that legislature alone was the body of men to do it. Further than that, the Constitution of the United States provides that the legislature shall do it.

The House agreed to the resolution reported by the committee without a division.

NOTE.—The debate will be found in the Congressional Globe, vol. 46.

For the report: Mr. Dawes, p. 756. Against the report: Mr. Segar, p. 729; Mr. Noell, p. 733; Mr. Maynard, p. 751; Mr. Crittenden, p. 753; Mr. Brown, p. 754; Mr. Mallory, p. 755; Mr. Knight, p. 755.

THIRTY-SEVENTH CONGRESS, THIRD SESSION.

FLANDERS AND HAHN, *of Louisiana.*

A disregard of a mere *directory* provision of the law cannot annul an election carried on with all the essentials of an election and with perfect fairness.

The fact that a *military governor* fixed the day of an election is not sufficient cause for withholding representation in Congress to the people of a State.

IN THE HOUSE OF REPRESENTATIVES.

FEBRUARY 3, 1863.

Mr. DAWES, from the Committee of Elections, made the following report:

That nearly all the facts upon which the claim of each is founded are common to both, and the conclusions of the committee being the same in each, one report will suffice for both cases.

The election was held on the third day of December, 1862. The first district in Louisiana is composed of the parishes of Plaquemines, St. Bernard, and that portion of the parish of Orleans which lies on the right bank of the Mississippi, and the said parish on the left bank below Canal street, in the city of New Orleans, including said city below said street.

The second district is composed of the upper portion of the city of New Orleans, commencing at Canal street, and Jefferson, St. Charles, St. John, St. James, Ascension, Assumption, Lafourche, Terrebonne, St. Martin, and St. Mary parishes.

At this election the vote cast in the first district was—

For Mr. Flanders	2,370
For all others	273
Total	2,643

In the second district there were four candidates, and 5,117 votes cast, of which—

Mr. Hahn had	2,799
All others	2,318
Total	5,117

Upon this vote Messrs. Flanders and Hahn claim to be elected and entitled to a seat in this house as representatives from their respective districts. Copies of their credentials accompany this report.

All question as to the validity of this claim grows out of the anomalous condition of things in Louisiana consequent upon the rebellion. The provisions of law upon the statute book of Louisiana, so far as they pertain to this case, as well as a brief recital of the principal events in the rebellion, which have deprived these districts of representation hitherto in this Congress, are necessary to a full understanding of the subject.

By an act of the legislature of Louisiana, entitled "An act relative to elections," approved March 15, 1855, page 408 of the sessions acts, it is provided "that elections for representatives in the general assembly shall be held on the *first Monday* of November, one thousand eight hundred and fifty-five, and every [illegible]rs thereafter," &c., and the same act contains the following sections rel-

presentatives in Congress:

SECTION 31. *Be it further enacted, &c.*, That all general elections for members of Congress shall be held at the same time and conducted in the same manner as is provided for the election of representatives to the general assembly.

SECTION 32. *Be it further enacted, &c.* That as soon as possible after the expiration of the time of making the returns of election for representatives in Congress, the governor, jointly with a secretary of state and a judge of one of the district courts of the State, shall proceed to ascertain from the returns the person duly elected, a certificate of which shall be entered on record by the secretary of state, and signed by the governor, and a copy thereof, subscribed as aforesaid, shall be delivered to the person so elected, and another copy transmitted to the House of Representatives of the United States, directed to the Speaker thereof.

SECTION 33. *Be it further enacted, &c.*, That in case of vacancy by death or otherwise in the said office of representative, between the general elections, it shall be the duty of the governor, by proclamation, to cause an election to be held according to law to fill the vacancy.

A regular election for members of the thirty-seventh Congress should have taken place on the first Monday of November, 1861; but at that time the State of Louisiana had been invaded and overrun by the rebel armies, and the governor (who had become a rebel) neglected and refused to order the election for members of Congress according to law. Hence, no such election was held, and Louisiana was for the time deprived of her right of representation in the House of Representatives.

On the 25th of April, 1862, the federal fleet under Commodore Farragut, after having passed Forts Jackson and St. Philip, and triumphed over all other resistance and obstructions in and along the Mississippi river, appeared off the city of New Orleans, and on the first of May the federal army had possession of the city, and General Butler published his first proclamation as commander of the "department of the Gulf," of which the following is the first paragraph:

The city of New Orleans and its environs, with all its interior and exterior defences, having been surrendered to the combined naval and land forces of the United States, and having been evacuated by the rebel forces, in whose possession they lately were, and being now in occupation of the forces of the United States who have come to restore order, maintain public tranquillity, enforce peace and quiet under the laws and Constitution of the United States, the major general commanding the forces of the United States in the department of the Gulf hereby makes known and proclaims the object and purposes of the government of the United States in thus taking possession of the city of New Orleans and the State of Louisiana, and the rules and regulations by which the laws of the United States will be, for the present and during a state of war, enforced and maintained for the plain guidance of all good citizens of the United States as well as others who may heretofore have been in rebellion against their authority.

The proclamation, among other things, invited "all persons well disposed towards the government of the United States" to "renew their oath of allegiance," and promised to such the protection of the armies of the United States. This invitation was accepted by the people to such an extent that on the 24th of September, 1862, in the parish of Orleans and the adjoining parish of Jefferson thirty-three thousand four hundred and fifty-three (33,453) citizens had taken the oath of allegiance. On the 21st of October following, twenty-seven thousand nine hundred and twenty-nine (27,929) more citizens had taken the same oath, as appears from the report of the provost marshal general of Louisiana. Brigadier General George F. Shepley was appointed military governor of the State.

Subsequently, as the rebel army retired from other portions of the State, and the federal army advanced and extended its lines to include that portion of the State generally known as the "Lafourche country," the citizens of this district also promptly came forward and renewed their allegiance to the government and the Union.

About four thousand white soldiers enlisted in the Union army in the city of New Orleans, and many of the citizens formed themselves into companies of home guards to assist the federal authorities in case of any attack by the rebels.

As fast as new parishes were brought into the federal lines, and the people in sufficiently large numbers renewed their allegiance and recognized the authority of the United States, the military governor of the State appointed judges,

justices of the peace, clerks of courts, sheriffs, constables, and other civil officers, and performed all the acts which legally and constitutionally devolve upon the governor of Louisiana. In all of which her loyal citizens acquiesced and rendered an unquestioned obedience.

Soon the people of the first and second congressional districts (which districts were *entirely* within the federal lines, with the exception of the parish of St. Martin and a portion of St. Mary) demanded the right of representation in Congress, of which they had for some time been deprived, through the treason of Governor Moore and the rebel invasion of the State.

On the 14th of November, 1862, George F. Shepley, military governor of the State of Louisiana, issued a proclamation ordering an election for members of Congress in the first and second congressional districts, as follows:

A PROCLAMATION.

By Brigadier General George F. Shepley, military governor of the State of Louisiana.

Whereas the State of Louisiana is now and has been without any representatives in the thirty-seventh Congress of the United States of America; and whereas a very large majority of the citizens of the first and second congressional districts in this State, by taking the oath of allegiance, have given evidence of their loyalty and obedience to the Constitution and laws of the United States:

Now, therefore, I, George F. Shepley, military governor of the State of Louisiana, for the purpose of securing to the loyal electors in the parishes composing these two congressional districts their appropriate and lawful representation in the House of Representatives of the United States of America, and of enabling them to avail themselves of the benefits secured by the proclamation of the President of the United States to the people of any State, or part of a State, who shall on the first day of February next be in good faith represented in the Congress of the United States by members chosen thereto at elections wherein a majority of the qualified voters of such State have participated, have seen fit to issue this my proclamation, appointing an election to be held on Wednesday, the third day of December next, to fill said vacancies in the thirty-seventh Congress of the United States of America, in the following districts, namely:

The first congressional district, composed of that part of the city of New Orleans heretofore known as municipality number one and municipality number three, and now designated as districts numbered two and three, and Suburb Treme, that portion of the parish of Orleans lying on the right bank of the Mississippi, and the parishes of St. Bernard and Plaquemines.

The second congressional district in the State of Louisiana, composed of that part of the city of New Orleans above Canal street, known as the first district, and district number four, formerly the city of Lafayette, and of the parishes of Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Assumption, Lafourche, Terrebonne, St. Mary, and St. Martin.

Writs of election will be issued, as required, and the election held at the places designated by law.

The proceedings will be conducted and returns thereof made in accordance with law.

No person will be considered as an elector qualified to vote who, in addition to the other qualifications of an elector, does not exhibit to the register of voters, if his residence be in the city of New Orleans, or to the commissioners of election, if his residence be in any other place in said districts, the evidence of his having taken the oath of allegiance to the United States.

Given under my hand and the seal of the State of Louisiana, at the city of New Orleans, this fourteenth day of November, A. D. 1862, and of the independence of the United States of America the eighty-seventh.

GEORGE F. SHEPLEY,
Military Governor of Louisiana.

By the Governor:
JAMES F. MILLER, *Acting Secretary of State.*

In accordance with this proclamation the sheriffs and other officers gave public notice of the holding of the election, and all due and usual steps were taken to hold the same according to law. The sheriff of the parish of Orleans, on the 16th of November, 1862, issued the following notices in French and English:

NOTICE OF ELECTION.

Pursuant to a writ of election bearing date November 13, 1862, and to me directed by his excellency George F. Shepley, military governor of the State of Louisiana, the qualified voters of the parish of Orleans are hereby notified that an election will be held on Wednesday, the 3d day of December, 1862, to fill the vacancy, being the unexpired term now existing in the representation, for one representative of the State of Louisiana to the thirty-seventh Congress of the United States from the first congressional district in the State of Louisiana, composed of that part of the city of New Orleans heretofore known as municipality No. 1 and municipality No. 3, and now designated as Suburb Treme, that portion of the parish of Orleans lying on the right bank of the Mississippi river, and the parishes of St. Bernard and Plaquemines.

The polls will be opened in each election precinct from the hour of 8 o'clock a. m. till 4 o'clock p. m. on the day above mentioned, to wit, the 3d day of December, 1862, for the purpose of receiving the votes of the qualified voters of the parish of Orleans, under the superintendence of the commissioners and clerks to be appointed by the authorities designated by law; the election to be conducted, and triplicate returns made to the undersigned, returning officer, according to law.

JAS. E. DUNHAM, *Sheriff.*

NOTICE OF ELECTION.

Pursuant to a writ of election bearing date November 13, 1862, and to me directed by his excellency George F. Shepley, military governor of the State of Louisiana, the qualified voters of the parish of Orleans are hereby notified that an election will be held on Wednesday, the third day of December, 1862, to fill the vacancy, being the unexpired term now existing in the representation, for one representative of the State of Louisiana to the thirty-seventh Congress of the United States from the second congressional district in the State of Louisiana, composed of that part of the city of New Orleans above Canal street, known as the first district, and district number four, (formerly the city of Lafayette,) of the parishes of Jefferson, St. Charles, St. John the Baptist, St. James, Ascension, Assumption, Lafourche, Terrebonne, St. Mary, and St. Martin.

The polls will be opened in each election precinct from the hours of 8 o'clock a. m. till 4 o'clock p. m. on the day before mentioned, to wit, the third day of December, 1862, for the purpose of receiving the votes of the qualified voters of the parish of Orleans, under the superintendence of the commissioners and clerks to be appointed by the authorities designated by law; the election to be conducted, and triplicate returns made to the undersigned, returning officer, according to law.

JAMES E. DUNHAM, *Sheriff.*

The 11th article of the constitution of Louisiana, of 1852, reads thus:

The legislature shall provide by law that the names and residences of all qualified electors of the city of New Orleans shall be registered, in order to entitle them to vote; but the registry shall be free of cost to the elector.

Notwithstanding this directory provision of the constitution, the legislature neglected to pass a *bona fide* registry law for the city of New Orleans until 1856.—(See Session Acts, page 131.) The registry law of 1856 provides for the appointment by the governor of a register of voters, "whose duty it shall be to register the names of all the qualified electors of said city in a well-bound book, which shall be kept for that purpose, to be called the 'original registry of voters,' in which he shall register, day by day, as they appear, the names and residences of all the qualified electors of the city of New Orleans," &c.

Section 5th provides that he "shall issue to every citizen, when his name is registered, an original certificate corresponding in name, residence, number, and date, with the original registry, and the presentation of such certificate, if required by the commissioner of election, shall be full proof of the facts contained therein and of the elector's right to vote," &c.

Section 12th reads as follows:

Be it further enacted, &c., That the register shall, on the morning of any general election, at the opening of the poll at each precinct in the city, deliver in person or by deputy to the commissioner of election a duly certified copy, written in a fair handwriting, of the precinct registry of all the names and residences of qualified electors as they appear on the registry, alphabetically arranged for the respective precincts of the city, with one-inch margin on the left hand side; and it shall be the duty of the commissioner of elections, whenever an elector

shall have voted, to mark on said margin, opposite his name, the word "voted," in a fair and legible hand. Should the register fail in this duty, or any other duty required by any of the provisions of this act, he shall forfeit his salary or fees of office, or so much thereof, according to the gravity of his act of commission or omission, as shall be decided in a suit or suits to be brought against him in either of the courts of the parish of Orleans, by the attorney general of the State, in the name of the State of Louisiana; but said register shall have the right of appeal to the supreme court of the State, and in the mean time the governor may suspend him from his functions and appoint a substitute, who shall thereby assume all the powers and incur all the responsibilities of the suspended register.

And section 15th is in these words:

Be it further enacted, &c., That the possession of the certificate of registry issued to the legally registered elector shall be the evidence of his legal registry, and shall be conclusive evidence of that fact, *and any mistake or omission of the register to place his name on the certified lists of registry, to be furnished to the commissioners of the different precincts, shall in no manner affect such elector's right to vote so far as the fact of legal registry is in question, and the commissioners shall not have any power or discretion to refuse to receive his vote on the ground of or for the reason that his name has been omitted in the lists so furnished by the register;* and the commissioner or commissioners so refusing shall in solido be fined in a sum of not more than one thousand dollars, and imprisonment for not more than one year, after conviction on trial before the first district court of New Orleans, on indictment or information, and shall moreover be answerable to the rejected elector, on suit brought by him before any court of the parish of Orleans, in such sum as the jury may in verdict award to him, and he shall not be required to prove any special damages further than his being, by the act of the defendant, deprived of his legal right of suffrage.

This law went into operation on the first Monday of October, 1856, but in 1861 a rebel legislature passed an act (page 17 of the Session Acts) the first section of which reads thus:

Be it enacted, &c., That the original registry of voters of the city of New Orleans now existing be, and the same is hereby, cancelled and annulled, and the register of voters in said city be, and is hereby, authorized and required to open a new book to be called the original registry of voters, to be kept in the same manner as the registry of voters cancelled by this act has been heretofore kept.

And the 2d section provides that no elector shall be registered unless he takes an oath to support the constitution of the State and of the *Confederate States*.

This act of 1861 was, of course, unconstitutional; and when the authority of the United States was again enforced the registry of disloyal electors to which it had given birth was done away with, and the original and only constitutional law on the subject—the act of 1856—was revived, and, as the "original registry of voters" had been cancelled and annulled, it became necessary to appoint a new and loyal register of voters, and to begin again a registry under the act of 1856, which was done.

The judges or commissioners of election in the parish of Orleans are appointed by a "central board of commissioners," composed of the mayor of the city, the register of voters, the attorney general of the State, "and two citizens of New Orleans, who have resided in the State at least five years, to be appointed by the governor."—(See act of 1857, page 289, section 6.)

This board performed its duties by appointing the judges of the election, and officially publishing their names, precincts, &c., in French and English, previous to the election.

As it was found impossible, for want of time, to register the names, &c., of *all* the voters before the day of election, the military governor ordered that those who were unable to have themselves registered in time should nevertheless be allowed to vote in the parish of Orleans in the same manner as is allowed in the country—by satisfying the commissioners of their right to vote. His proclamation to that effect is herewith submitted.

On the day of the election the registry of voters, as far as made, was at every poll; but persons whose names were not on it were, by the commissioners of their respective precincts, allowed to vote by proof of the requisite qualifications, which was mostly done by the production of the certificates mentioned in section *15 of* the act of 1856.

Some might suppose this a departure from the law; but when the language of section 15 of the act of 1856 is considered and applied to the facts, it is difficult to see how the spirit of that act has been disregarded; and had its provisions been ignored in this particular it would clearly have been only a disregard of a mere *directory* provision of the law. The principal and only aim of the law is to secure fair elections, and the non-observance of directory provisions cannot annul an election carried on with all the essentials of an election and with perfect fairness.

This principle of law, with regard to directory provisions, has been repeatedly and clearly laid down by the supreme court of Louisiana and the supreme courts of other States, as well as by the Supreme Court of the United States, and is too well understood by every legal mind to need any elucidation here. And it is expressly enacted that no elector shall be deprived of his vote by any omission to give him a certificate of his election.

It may be well to remark that under no possible view can this question be of any practical importance in this case, as the result would be the same with regard to the successful candidates even if the whole vote of New Orleans would be thrown out, for they both obtained majorities in the country parishes of the respective districts where there are no registry laws.

The election took place on the 3d of December, and the following statement shows the result in detail:

First congressional district, State of Louisiana.

Parishes.	CANDIDATES.			
	B. F. Flanders.	J. E. Bouligny.	Scattering.	Total.
Orleans	2,146	136	16	2,298
St. Bernard	43	11	.....	54
Plaquemine	141	10	.....	151
Total	2,330	157	16	2,403

Second congressional district, State of Louisiana.

Parishes.	CANDIDATES.					
	M. Hahn.	E. H. Durell.	Jacob Barker.	W. R. Greathouse.	Scattering.	Total.
Orleans	1,411	856	265	178	3	2,713
Jefferson	133	51	46	179	.....	409
St. John's, (no returns)	.....	.....	.....	.....	.....	.....
St. Charles	.....	11	22	.....	.....	33
St. James	89	.....	7	.....	18	114
Assumption	157	382	49	.....	1	589
Ascension	218	8	17	.....	.....	243
Terre Bonne	461	38	27	.....	28	554
Lafourche	330	112	20	.....	.....	462
Total	2,799	1,458	453	357	50	5,117

In the parishes of St. Mary and St. Martin's, the only other parishes of the second congressional district, there was no election, in consequence of the presence of rebel guerilla bands in portions of those parishes.

The committee have found little difficulty in coming to a conclusion that the claimants should be admitted to their seats, except in doubts as to the power of the military governor to fix the day of this election. In all things else there has been strict conformity to law. The districts were entirely free from a rebel force to restrain or overawe the loyal votes. The old voting precincts and voting places were all restored, and votes polled at every one of them, except in one inconsiderable parish, and part of another in one district into which guerillas sometimes made incursions. There was a very full vote given—a remarkably full one when compared with the vote at former congressional elections, if allowance be made for the usual proportion of voters among the soldiers absent in the Union and rebel armies. Two thousand men had been recruited by General Butler into his own regiments, and two full regiments of Louisiana troops had been organized by him from these two congressional districts, while more had gone into the rebel army, though many of these had returned to the city and their allegiance. Deducting the proper proportion of voters from these, and there can be no doubt of a full vote when the result is compared with that in former years. At the last election for representative in the first district, in 1859, the whole number of votes was 4,970; at the present election 2,643; difference, 2,327. In the second district, in 1859, the whole number was 10,367; at the present election the whole number was 5,117; difference, 5,250.

The election appears to have been preceded by as earnest a canvass, by different candidates, as is usual. Public meetings were held in the city hall and other parts of the city. Conventions were held, candidates brought forward, their merits canvassed, and some withdrawn, while others and all who wished, and had not disqualified themselves under the act of Congress by their connexion with the rebellion, tried their chances of an election. The public papers, immediately after the election, testified to the quiet and good order which distinguished the day; and one of them, published by a defeated candidate, speaks the next morning after the election of the manner in which it was conducted as follows:

From the National Advocate, owned and published by Mr. Jacob Barker, one of the defeated candidates.

The election yesterday, in the second congressional district, so far as the city is concerned, resulted in giving Mr. Hahn a majority.

It was the most orderly and well-conducted election ever witnessed in this city.

So far as Mr. Barker was personally concerned, he is well pleased with the privilege of remaining at home. His wish, often put forth in this paper, was that every elector should vote for the man he considered best qualified for the work to be done.

The New Orleans Delta, which supported Mr. E. H. Durell in the second congressional district, on the morning after the election uses the following language:

We should have been gratified to announce the election of Mr. Durell. He is an able man and would have done the State service. But we are satisfied with the result, since so able a man and true a patriot as Mr. Hahn has won the prize.

It further says:

The election yesterday, for two members of Congress to represent the first and second congressional districts of Louisiana, passed off very quietly. There was no disturbance of any kind, so far as we have heard; and in this particular we have to congratulate the inhabitants of this city on the favorable change that has taken place in the manners of the people since the advent of the new *régime*. There were, to be sure, some noisy demonstrations on the part of the partisans of Mr. Jacob Barker, but he was defeated—getting fewer votes than any other candidate.

The New Orleans True Delta, a paper which supported Mr. Hahn in the second district, but *not* Mr. Flanders in the first, two days after the election commences an editorial as follows:

Now that the smoke of battle of Wednesday's election has cleared away it may not be considered inappropriate if we refer, in a few words, to that important event. The election for Congress in the first congressional district seems to have gone by default, Mr. Flanders having been almost unanimously elected.

The contest in the second congressional district, always considered one of the most important districts in the State, was an exciting one, &c.

Major General B. F. Butler, in his farewell address to his army, dated December 15, 1862, pointing with pride to the peaceful fruits of the restoration of order and law in the rear of its triumphal march, thus speaks to it at different and distant posts of duty:

I take leave of you by this final order, it being impossible to visit your scattered outposts, covering hundreds of miles of the frontier of a larger territory than some of the kingdoms of Europe.

In enumerating the benefits conferred on Louisiana by the entrance and conduct of the federal army, he says:

You have fed the starving poor, the wives and children of your enemies; so converting enemies into friends, that they have sent their representatives to your Congress by a vote greater than your entire number from districts in which, when you entered, you were tauntingly told that there was no one to raise your flag.

And in his farewell address to the citizens of New Orleans, dated December 24, 1862, General Butler says: "I have given you freedom of elections greater than you ever enjoyed before."

Indeed, one of the most cheering omens of restoration and peace which has been discovered in the whole progress of the war is the alacrity with which the electors of these two congressional districts responded to this call for an election of representatives to the United States House of Representatives, and the orderly manner in which they exercised the elective franchise.

It remains to be considered, finally, whether this election, thus conducted, in which all the loyal voters in such numbers participated in conformity with all the provisions of law, shall be set aside by this house and the representation denied, because the time for holding it was fixed by the military governor in the absence of any other governor. The exact powers of a military governor *cannot be easily defined.* They have their origin in, and are probably limited

by, necessity. They are to some extent civil as well as military, and the authority for his civil functions is no less clear than for his military. The Supreme Court and Congress have recognized both. The former, in the case of Cross *vs.* Harrison, (16 Howard, 164,) recognized as valid the imposition and collection of duties by a military governor, even after the port at which they were imposed and collected had been by statute included in a collection district and a collector appointed, but who had not entered upon the duties of his office. And Congress admitted California into the Union with a State government formed and set in motion, even to the election of senators and representatives in Congress, exclusively under the auspices of a military governor. The constitutionally elected governor of Louisiana had turned traitor, and refused to discharge his constitutional obligations in this regard. What were the loyal voters to do? Were they to turn traitors also or be disfranchised? The Constitution imposes upon the United States this obligation, (art. iv, sec. 4:)

> The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them from invasion; and on application of the legislature, or of the executive, (when the legislature cannot be convened,) against domestic violence.

Representation is one of the very essentials of a republican form of government, and no one doubts that the United States cannot fulfil this obligation without guaranteeing that representation here. It was in fulfilment of this obligation that the army of the Union entered New Orleans, drove out the rebel usurpation, and restored to the discharge of its appropriate functions the civil authority there. Its work is not ended till there is representation here. It cannot secure that representation through the aid of a rebel governor. Hence the necessity for a military governor to discharge such functions, both military and civil, which necessity imposes in the interim between the absolute reign of rebellion and the complete restoration of law. Suppose Governor Moore to be the only traitor in Louisiana. One of two things must take place. The people must remain unrepresented, or some one must *assume* to fix a time to hold these elections. Which alternative approaches nearest to republicanism—nearest to the fulfilment of our obligations—to guarantee a republican form of government to that people, closing the door of representation, or recognizing as valid the time fixed by the military governor? Are this people to wait for representation here till their rebel governor returns to his loyalty and appoints a day for an election, or is the government to guarantee that representation as best it may? The committee cannot distinguish between this act of the military governor and the many civil functions he is performing every day, acquiesced in by everybody. To pronounce this illegal, and refuse to recognize it, is to pronounce his whole administration void and a usurpation. But necessity put him there and keeps him there.

Again: this George F. Shepley assumes to act as governor of Louisiana, discharging the civil functions of such governor. This is one of them. All loyal men in the State acquiesce in these acts. There is no other man discharging them or seeking to discharge them. This act of fixing the time of an election comes in conflict with no time fixed by any other man. This is to be governor *de facto*. This house has no jurisdiction to determine who is rightfully in the office of governor of Louisiana. Thus, if this act be taken as the act of a governor *de facto*, it must be recognized as valid. The present house has already recognized and pronounced as valid this very act of a governor *de facto* in fixing the time for holding an election in the case of two members of the house from Virginia.

The committee are therefore constrained, as well by the precedents which this house has already laid down for its guide as by the other considerations herein submitted, to recognize the day thus fixed for this election.

In a case heretofore submitted to this committee, that of the honorable Andrew J. Clements, of Tennessee, after a careful consideration of the whole subject

they submitted a resolution, which was unanimously adopted by the House, in favor of his right to the seat he claimed, based upon the following conclusion:

In conclusion, the committee, upon the whole evidence, find that on the day of election no armed force prevented any considerable number of voters in any part of the district from going to the polls; and that on that day, in conformity with the forms of law, two thousand votes at least were cast for the memorialist as a representative to this Congress, and none, so far as the committee know, for any other person. They therefore report the following resolution, and recommend its adoption.

In the Louisiana cases, here presented, all the essentials of this case are fully found, and all that is essential to an election abundantly proved. The committee, therefore, report the following resolutions:

Resolved, That Benjamin F. Flanders is entitled to a seat in this house as a representative from the first congressional district in Louisiana.

Resolved, That Michael Hahn is entitled to a seat in this house as a representative from the second district in Louisiana

The debate upon this case was very lengthy, covering many points not involved in the legal principles decided by the committee. The extracts given below will show the course of the argument for and against the report:

Mr. DAWES. * * * * And the committee were led to inquire what were the powers of a military governor, and how far the civil functions which he exercises are to be held valid, or at least be recognized by this house. The committee sought, as the House well knows, to obtain from the President what sort of a commission he clothed this military governor with—without success, however. The office of military governor is not very clearly defined. I suppose it has its origin in necessity. There is an absolute necessity for some person, under the circumstances in which we found ourselves in New Orleans, to discharge precisely the functions discharged by this governor. He must of course take his authority not from the constitution of Louisiana or the laws of the State, for neither the constitution of Louisiana nor the laws of that State contemplated such an exigency as was upon the people there; nor have the laws of the United States. They have never contemplated that the governor of Louisiana should turn traitor and abdicate the office of governor under the constitution and laws of the State.

What, then, of the acts of this military governor are to be recognized? That he has discharged every day there civil as well as military functions cannot be denied. A military governor is not entirely unknown to the law, even in this country. The Supreme Court of the United States has recognized not only the power of the President of the United States to appoint a military governor, but has recognized both his military and civil functions as binding in law. They have not undertaken, it is true, to say how far, as a military man, he may discharge the functions of the civil governor. So far as they have had occasion to pass, they have limited them as near as may be to the line of necessity. They have, however, given full force and effect to the acts of a military governor, when acting in a civil capacity. When a military governor was appointed for the Territory of California, before it was admitted as a State into the Union, he was obliged, from that same necessity, constantly to discharge the civil functions, and civil functions of a variety of character, for which we have no authority except that of necessity. These have come under the cognizance of the Supreme Court of the United States, and they have pronounced them valid even to the extent of imposing duties and collecting revenue by a collector of a port appointed by the military governor, and who continued in the discharge of his functions, imposing duties and collecting revenue, even after that port had been embraced within a collection district, and a collector had been appointed in accordance with the requirements of the statute. So that, to some extent, certainly we have the highest authority for the validity of the civil functions of a military government.

The question comes, what is the limit; or, rather, the practical question is at this moment whether these particular functions, exercised under these circumstances, are of such a character as to deserve to be recognized by this house at this time? Those who believe that he cannot exercise civil functions of course strike at all of his acts, and upturn all that he has done during the exercise of his power in New Orleans. They pronounce invalid all of his acts, even to the judgments of the courts and the executions of those judgments, the enforcing of police regulations and the collection of debts; in other words, they revolutionize anew and break up the order of things established there, and create anew chaos, I suppose to show with what skill they can restore again from chaos law and order.

The question arises how we can from chaos draw anew law and order except on the assumption at some point of the power by some person. Inasmuch as the constitution of Louisiana, or the laws or the Constitution of the United States, inasmuch as they have all failed to provide for such a contingency, one of the two things must be: the chaos must obtain *forever in that State*; we must wait for the return of the traitor governor of Louisiana

to loyalty and to the discharge of the functions of his office; or somebody must assume at some point authority to set the wheels of the government again in motion. It has always been the practice of the House in the absence, from any cause whatever, of the civil government, to set it in motion, and to recognize as being necessary and assuming to be lawful that which some man may assume to perform. The committee did not see any good reason for making that assumption at one point or at another; but wherever it may have sprung up, provided that the loyal people acquiesce in it and regard it as legal, and provided that it confined itself to the necessities of the case, to set the law and the Constitution itself in motion at the earliest possible period of time. The people must be satisfied with it. It did not seem to us that it made a difference whether they recognized it at one point or another. So this house has often set the example that it is a matter of indifference at what point the assumption is made.

Mr. MAYNARD. I ask the gentleman from Massachusetts to allow me a few moments on this question at this point, if it is his intention to call for the previous question when he has closed his remarks.

Mr. DAWES. I do not intend to call for the previous question. Mr. Hahn desires also to speak on the report of the Committee of Elections.

Mr. Speaker, I was saying, when interrupted, that Congress itself had set the example of recognizing as legal the war-exercising authority in different stages of this rebellion in the different States, provided that they could be satisfied that these acts resulted from necessity, and were acquiesced in by the people. The Senate, in recognizing the case of a new legislature of Virginia, started, improvised—I will not say that that is the opinion, although I entertain the opinion—it improvised in Western Virginia a legislature which sent two senators, bringing with them the seal of the State and the name of a new government almost not an hour old. They refused to inquire into the legality of the proceedings and the authority under which this government acted, falling back on the question whether it was not a *bona fide* government; whether wisely or not it is quite too late for us to say now, for following that up, the House recognized the authority of that very government. We recognized the authority of the governor to hold elections. He made his proclamation, issued his writs of election, and elections were held under them; and, sir, the members elected at those elections are now sitting in this house. The right to their seats is traced directly to that point.

Mr. WICKLIFFE. Was not that governor elected by the people?

Mr. DAWES. Not until long after the transactions I have alluded to.

Mr. WICKLIFFE. Then how was he made governor?

Mr. DAWES. He was appointed governor by a convention.

Mr. WICKLIFFE. Convention of the people?

Mr. DAWES. A general convention, who claimed to represent the people.

Mr. WICKLIFFE. Yes, sir; they represented the people there.

Mr. DAWES. Precisely as I have said before, that in what form and in what manner that assumption of power is obtained, it has no authority of constitutional law behind it. It is ordinarily done through the machinery of a convention; but there is no constitutional law, no law of any kind, that clothes such a convention with any more authority than a mass meeting of New Orleans, where the whole body of voters assembled.

Mr. ROSCOE CONKLING. Is not the distinction, that in the case he speaks of, the government was a provisional government of the people and purely a civil government?

Mr. DAWES. I do not know what my friend calls a provisional government. It was a provisional government that provided for the necessities of the case. In that sense it was a provisional government. It was born of a mass meeting. The man who came from that body is governor of Virginia. He is clothed with powers as commander-in-chief as well as with those of civil governor.

Mr. ROSCOE CONKLING. Still he was a civil governor.

Mr. WICKLIFFE. Oblige me with the law that confers the authority on these military governors. Who confers that power? Who creates the jurisdiction? And what are the limitations of the powers of a military governor?

Mr. DAWES. The gentleman has not done me the honor to listen to what I have said, or else I have failed to make myself understood.

Mr. WICKLIFFE. I beg the gentleman's pardon.

Mr. HARRISON. If there had been an acting civil governor of the State of Louisiana at the time these elections were ordered, would he have been authorized by the laws of the State of Louisiana to have issued a proclamation directing such elections to be held in these districts at the time the elections in question were held?

Mr. DAWES. There is no doubt about that. If the gentleman will read the report, he will find the authority to the governor of the State.

Mr. HARRISON. I find that section thirty-three of the election law of Louisiana provides—

"That in case of vacancy by death or otherwise in the said office of representative between the general elections, it shall be the duty of the governor, by proclamation, to cause an election to be held according to law to fill the vacancy."

I understand the fact in this case to be that these elections were ordered to be held to fill vacancies alleged to have arisen by reason of the failure to elect members of Congress in

November, 1861, that being the time prescribed by the laws of Louisiana for the regular election of members of Congress. Does the section of the law which I have quoted provide for the precise case we have here?

Mr. DAWES. The law is as it has been read. That is, if during the two years for which the representative in Congress is elected the vacancy shall occur from any cause whatever, then it is the duty of the governor, by proclamation, to call an election to fill that vacancy.

Where the time prescribed by the regular law for the election of a representative to Congress passes, for any reason whatever, and there is nobody in office, there is a vacancy which the governor of a State is required to fill. I think the office is quite as empty with nobody in it as if somebody had been in it a part of the term and then died. The House has passed upon that question heretofore. The question was up for discussion in this hall in one of the Virginia cases, and the point was taken by the claimant in the House that there could not be a vacancy unless the office had been once filled; but the House thought otherwise, and I think the House was right.

Sir, this man was discharging all the duties of governor of Louisiana which it became necessary to discharge. We are not authorized to pass upon the question whether or not he rightfully discharges those duties; that is to say, we are not authorized to pass upon the question who is governor and who is not for the State of Louisiana. So far as we are concerned we have the power to reject or admit a member for any reason we please. Discharging all those duties; holding himself out to the public as governor of Louisiana to this extent; everybody acquiescing; no one act of his, so far as our information is concerned, conflicting with any other act of anybody else assuming to be governor—it is fair, I say, that we may to this extent treat him as governor of Louisiana *de facto*. I know very well that according to the strictest old common-law definition of a governor *de facto* it may be difficult to sustain entirely his position as such.

I do not put my position upon that ground. I say that that ground has been deemed, in this house and in the other branch of Congress, to have been a sufficient ground upon which to rest in recognizing the acts of a man assuming to be the governor of a State, when, in point of fact, he had no legal authority for those acts.

But, sir, another more serious question is presented, after all: how are these districts and this State ever to be represented again in this Congress, except by some means entirely analogous to this case? I do not mean by means exactly like this; but I do not see how there can ever exist any means in the world for these districts ever again to be represented in this Congress except by means analogous to this, and having no more authority or sanction of law than this has. The authority of law may originate through a different machinery; it may start from another point; it may go back to mass conventions in the district of State; it may arise from usurpation of authority, in which all the people may acquiesce; yet it still starts somewhere by itself, and without constitutional authority or authority or law.

Therefore it is that the committee do not see that it matters at all whether it starts at this point or any other, provided it has the all-important and all-essential element of securing to the people of these districts the free and untrammelled and unawed exercise of the elective franchise. That they are entitled to representation here, no man who acknowledges his obligations to the Constitution can doubt for a moment. That we have something to do as a government here in Washington in securing to them that representation, I do not see how anybody can doubt for a moment. What we shall do, or what are the particular means or methods by which we shall secure that, may depend upon the circumstances of each particular case; but if we acknowledge the obligations of the Constitution upon us to guarantee to them a representation here, we have got to do our part towards securing it.

And when a case is presented like this, where there has been such freedom and such a full and hearty expression of the choice at the ballot-box; where the forms of law have been complied with with such scrupulous regard; and where the election lacks only the constitutional sanction of a governor, who has fled the country and refused to discharge the duties devolved upon him by the Constitution, shall we shut the door against such a representation as this, and ask ourselves whether any other method better, any other method safer or more in conformity with republican institutions and the requirements of the Constitution, can be adopted there with any hope of success?

I am not an advocate of the authority of military governors. The presence of that authority one inch beyond where it is necessary does not meet my approval. I would circumscribe it to the narrowest possible limits. I would give to this act of authority precisely the same force and effect here to-day as if it originated in the appointment of him by a mass meeting of all the electors of these two congressional districts assembled in the City Hall at New Orleans, because I believe in setting in motion the wheels of government in these States at the earliest possible moment.

I believe, as I have often stated here, and tired the ear of the House by repeating, that it is the only hope of the restoration and of the continuance of this government in the form and under the sanction of the Constitution; and no better method, no healthier method, to my mind, is open to us than that which, reorganizing the spontaneous voice of these electors, gives it a place here, around which the Union sentiment of Louisiana may cluster, and cling, and twine itself, and grow and bear fruit.

* * * * * * * * * * * * *

Now, one word as to this matter of registry. My friend from Maryland [Mr. Crisfield] claims that this was an utterly illegal election, because of a want of the registry of the voters. The gentleman claims that such registry is essential to the qualification of the voter, rather than to the evidence of that qualification; and that the qualification of a voter to the exercise of the elective franchise depends upon what another man shall do to secure to him the evidences of that right. That is altogether a mistake. The right of voters to exercise the elective franchise does not depend upon the question whether other men do their duty. Nor did the statute of Louisiana ever contemplate such a thing. The statute of Louisiana appointed this man to make a registry, and it imposed a very heavy penalty upon him if he did not register a man, and did not furnish him with a certificate of evidence that he was a citizen.

And then, in order that a man might not be deprived of his right to vote if he failed to get the certificate, it further provided in terms:

"*Be it further enacted, &c.*, That the possession of the certificate of registry issued to the legally registered elector shall be the evidence of his legal registry, and shall be conclusive evidence of that fact, and any mistake or omission of the register to place his name on the certified lists of registry, to be furnished to the commissioners of the different precincts, shall in no manner affect such elector's right to vote, so far as the fact of legal registry is in question, and the commissioners shall not have any power or discretion to refuse to receive his vote on the ground of or for the reason that his name has been omitted in the lists so furnished by the register."

Thus it expressly provided, out of abundant caution, that the right of an elector to the exercise of the elective franchise shall never be extinguished by the folly and madness of any man whose duty it is to furnish him with evidence of his right.

But, sir, all those voters had been registered once. The rebel legislature had destroyed one old registry that had their names upon it. The law nowhere required them to be registered twice. Does the gentleman claim that the rebel legislature, by destroying this registry, had forever disfranchised all the citizens of New Orleans, and that by an act admitted to be unconstitutional? Has the distinction between *directory* acts and others occurred to the mind of the gentleman? Does he not know that there are many, especially in matters of election, mere directory laws, a failure to observe which will not vitiate the election? The court of appeals of New York (People *vs.* Cook, 8 New York Reports, 256) thus states it:

"The provisions of the statute, as to the manner of holding elections, canvassing votes, and making certificates of canvass, are in many respects directory, and neglect to comply does not always vitiate the election."

It was decided in that case that an election conducted by inspectors *de facto* is valid, and will not be avoided except for fraud.

A case was decided by the court of appeals, the court of last resort in New York, in 1856, so strikingly analogous to the one before the House that I beg leave to call attention to it. Judges of the supreme court of that State are elected by the people. Vacancies are filled by executive appointment. The statutes provide that on the 15th October preceding each general election in November notice shall be given of all officers to be voted for at that election.

After this notice had been given, and a few days before the election, a judge died. It was too late to give any notice according to law, and none was given. The people took notice of the vacancy, and of their own mere motion voted for a successor. The governor, believing that the "next election" meant the one "next" after a legal notice could be given, appointed a man to fill the vacancy. In a *quo warranto* (Davis *vs.* Cowles, 13 New York Reports, 350) this is the decision:

"When the office of a justice of the supreme court becomes vacant before the expiration of his term of office, the vacancy is to be supplied by the electors of the judicial district in which it exists at the next general election of judges, *although the vacancy occurs at so late a day that no notice is or can be given by the secretary of state, or other officer, pursuant to the statute, that a justice is to be elected at such election to fill the vacancy.*"

Mr. VOORHEES. * * * * Again, sir, I come back to the very foundation of this whole proceeding. I deny that George F. Shepley, as brigadier general and military governor of Louisiana, or in any other capacity, unless the people of Louisiana had of their free, unfettered choice, made him their governor under the constitution and laws of that State, had any right at all to the power which he has exercised. I care not if he had exercised its power in accordance with the forms and precedents of the constitution and laws of Louisiana. The question would still arise as to his right to be in that capacity at all. The constitution of Louisiana knows him not. The Constitution of the United States knows not this man George F. Shepley, as the governor of a State, military or civil. He is known to nothing except the appointing power that rests in the commander-in-chief of the army, the President of the United States, to make him a general. Do you know what powers appertain to a brigadier general of the United States army? If you do, you know what powers reside with George F. Shepley; and he can properly exercise no others. Outside of them he is a dead man officially, and his acts have no validity with me.

You may argue questions of expediency; you may argue questions of the restoration of the Union; I shall argue first my oath, my conscience, and my duty to civil liberty. You may reflect your wishes, your hopes, and your fears in your arguments here, but nothing

can change a principle or escape the power of truth. No ingenuity can reason away the fact that in this proclamation George F. Shepley was a usurper. It is of a piece, too, with a wide-spread system of executive encroachment, which, unless trampled under foot by the representatives of a free people, will speedily trample us to death under its feet. Give to this system vitality here in this hall, and if your armies move on and take possession of States, the representatives, not of the people, but of the one-man power enthroned at the west end of this capital, will be seen here outnumbering and defeating the representatives of all the loyal States in this Union. In vain then will popular elections take place; in vain will popular measures be inaugurated; your President can defy them all.

If you enter upon the course which the recommendation of the Committee of Elections invites us to pursue, this day you place the liberties of the people in the hands of the President. A majority in this house may adopt this resolution, but that majority no longer expresses the will of a majority of the people. No, sir; the people of the country are listening with joyful anxiety for the sound of the retiring footsteps of the majority of this house as they go out to return no more to these halls. I declare before the country that within the last twenty months the thirty-seventh Congress has sanctioned greater strides towards despotism than has ever been made in any other government professing constitutional limits within a period of two hundred years. And if I had not thought this was a part and parcel of a grand gigantic system of executive domination, I would not have raised my voice to-day. It is not my custom nor my pleasure to mingle much in debate. But I ask the people to watch the proceedings on this question.

If the army can go forth and bring representatives with voices equal to ours, with no constituents to trammel them at their back, with no one to represent except the President, then we might as well know it at once. Then our seats here become worse than valueless. They will be emblems of our vassalage. I do not say, and do not wish to be understood as saying, that the gentlemen from New Orleans would, in any sense, be the tools and the implements of usurped power here. I know nothing of it. I care to know nothing of it. The principle, however, is fraught with disaster and absolute overthrow to republican liberty. It is also fraught with the absolute overthrow of the independence of this legislative body. You may sanction it if you please. I wash my hands of it.

Mr. PORTER. * * * The gentleman from Massachusetts says that the claimants were elected in pursuance of the provisions of section thirty-three of the act of the legislature of Louisiana, which provides that—

"In case of vacancy by death or otherwise in the said office of representative between the general elections, it shall be the duty of the governor, by proclamation, to cause an election to be held according to law to fill the vacancy."

Can it be possible that the gentleman maintains that these elections are valid under that provision? I think I have shown, by satisfactory historical citation, that the clause in the Constitution touching the time, place, and manner of electing representatives was meant, in part, as a safeguard against the power of the President. Can it be possible that a military agent, a commandant appointed by the President, assuming the title of military governor of Louisiana, but not professing to derive any authority from the constitution of that State or from the people thereof, can be regarded as the executive authority of the State under that section or under the second section of the first article of the federal Constitution? It is trifling with the good sense of the House to argue such a proposition. Let us see to what it would lead.

The federal Constitution does, indeed, provide that when vacancies happen in the representation from any State, the "executive thereof" shall issue writs of election to fill them. It also provides that when vacancies happen, by resignation or otherwise, in the seats of senators, during the recess of the legislature of any State, the "executive thereof" may make temporary appointments until the next meeting of the legislature. Will it be argued that a military governor appointed by the President as General Shepley was may appoint senators of the United States? That would, indeed, be allowing a President more ambitious than the present incumbent of the office dangerous powers indeed. That would, indeed, be akin to the power of the king to "add at his will new members to its upper house, by creating peers."

Sir, the so-called military governor of Louisiana is merely a military commandant, appointed to aid in suppressing domestic insurrection. He cannot, in any proper sense, be called the governor of the State, because the constitution and laws of Louisiana provide how a governor shall be appointed; namely, by means of a popular election. He may, indeed, as a military officer of the United States, exert some of the powers that the governor of Louisiana was capable of exerting under the State constitution, but that is merely an accident.

Mr. MAYNARD. Will the gentleman explain what becomes of the civil rights of the people of Louisiana?

Mr. PORTER. I suppose, from the question now put and one propounded a short time since, and from his speech, that the gentleman from Tennessee means to direct my attention to the clause in the federal Constitution which declares that "the United States shall guarantee to every State in this Union a republican form of government." But that can have no bearing upon the question under discussion. What is the meaning of that provision?

Clearly, it relates to States, in connexion merely with their State functions, and not in connexion with their relations to the federal government. It leaves the constitutional provision concerning the time, place, and manner of holding elections for representatives in Congress unaffected. The guarantee is to every State. It is the duty of the United States to prohibit the exercise of authority under any other form of government in the State, and to remove all obstructions to the maintenance or restoration of the republican form.

In Louisiana the constitution and the laws in existence when the rebellion broke out remain unchanged, but there are no agents to give efficacy to them, those who were invested with official authority having by the act of rebellion, disavowing the government of the United States and claiming to live under another government, abdicated their offices. It is the duty of the United States to remove all impediments in the way of the loyal people which prevent them from enjoying the benefits of their State constitution and laws as they existed before the rebellion. Possibly, to facilitate this, it might exert a limited power to set the machinery of the State government in motion.

But it is the policy of the Constitution to allow as little interference by the federal government with the institutions of a State as is consistent with the maintenance of the federal relation. It might possibly be proper, under particular circumstances, to appoint the subordinate officers requisite to call the primary elections and to fix the times for them: to touch the spring that might set the first wheel going, that the impulse might be communicated from one to another till the whole machinery should be in motion. But it would be monstrous to maintain that the federal government could appoint all the officers of the State, governor, judges, members of the legislature, &c., because so soon as the incipient machinery of the State should be set in motion, the people could speedily choose these important officers in the way provided by their constitution and laws. Whether this view, however, be right or wrong, is not at all important in the present discussion.

The validity of these elections is argued upon another ground, namely, that there was a voluntary assemblage of the people, by common concurrence, to elect representatives in Congress; that they proceeded as nearly as possible according to the requirements of the State laws to make a choice; and that there has since been a general acquiescence in the selection. If this were strictly true, still the election could not be supported, because "the times, places, and manner of holding elections for representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations;" provided that "when vacancies happen in the representation from any State, the executive thereof shall issue writs of election to fill them." *Expressio unius exclusio alterius est.*

But what evidence is there that there was a free and voluntary election by loyal citizens anxious to re-establish their former relations with the federal government by selecting representatives the most acceptable to themselves to the Congress of the United States? I wish I could believe that there had been such an election, evincive of the restoration to loyalty of the city of New Orleans. But independently of what we know concerning the disloyalty of a very great part of the inhabitants, it seems to me that the report of the Committee of Elections exhibits plainly the motive which drew them to the polls, and shows the moral coercion under which they voted.

Mr. BINGHAM. * * * The Committee of Elections have made a report which does honor to their candor. I am constrained to differ with them in the conclusion at which they have arrived. They have had the integrity to say to the House in their report that the legislature of the State of Louisiana has by law declared that no person shall be a qualified elector within that State who does not take the oath of allegiance, not only to the State of Louisiana, which was well enough in itself, but the oath of allegiance to that infernal organization known as the confederate States of America.

Mr. DAWES. Not quite that. That had reference to New Orleans; but it may amount to that.

Mr. BINGHAM. I am obliged to the chairman of the Committee of Elections for calling my attention to the language or meaning of the enactment. I never saw it, save in the committee's report, but I have no doubt the committee quote it correctly. I think the chairman is correct in his impression when he says it amounts to that. It unquestionably does amount to that. They have provided, and so the committee have reported, that no electors shall be registered unless they take the oath to support the constitution of the State and the constitution of the confederate States.

Mr. DAWES. That was a registry applying to the city of New Orleans, and not to the State. I want to ask the gentleman if he considers that a constitutional and valid act?

Mr. BINGHAM. No, sir; not as against the federal government or the loyal citizens of the United States.

Mr. DAWES. I would ask the gentleman, too, whether he is not in the habit of holding an unconstitutional act as of no force at all?

Mr. BINGHAM. I agree that it is of no force as against the federal government or the loyal citizens of the United States. I desire to make this statement, however, about this provision, that so far as the State of Louisiana is concerned, that act repealed the pre-existing *law upon the* subject of elections and substituted a new law for it, and put into it the provision which I have quoted as to the qualification of electors.

I desire to say further of that provision, that it is not directory, as are the provisions of the original act for a registry of voters. I do not see how any man can come to any other conclusion than that it is a declaration of the legislature of the State of Louisiana that no person shall be registered, and, therefore, no person shall be a qualified elector within the registration districts of that State who does not take an oath to support the confederate States of America; in other words, who does not take an oath to support the confederation of thieves and traitors who hold their high counsels to-day in Richmond.

Now, I agree with the honorable chairman of the Committee of Elections that this provision of the State law is void, so far as it touches the rights of any loyal citizen under the federal Constitution. Thank God! such is the wisdom, scope, and effect of the federal Constitution, that though hand joins with hand to overthrow the rights of the loyal minority in any State, the humblest citizen who is true to his fealty is secure in his rights as a citizen of the federal republic under the guarantees of the Constitution, despite the conspiracy against him by the majority in his own State. Does any one, I respectfully inquire, disagree with me in this conclusion? But how can a loyal minority in an insurgent State, whose local government is disorganized, elect representatives to Congress? All must agree that there can be no State organization; there can be no State government; there can be no State legislative enactments by which federal representatives may be elected under the federal Constitution save by the act of the people of the State. Who is there here to deny that proposition?

Mr. LOVEJOY. Does the gentleman mean that it requires the action of all the loyal people of a State to entitle any portion of the loyal people to a representative here?

Mr. BINGHAM. No, sir; that is not my proposition. I said no such thing. My proposition is, that there can be no State legislation under which representatives in the federal Congress can be chosen, except that State legislation originates with the people resident within the State. I have said already that rebels in arms have no right of representation, but those who resist rebellion in an insurgent State, and are sufficiently numerous to support a constitutional State government, and do support it, are entitled to representation in Congress.

Mr. KELLOGG, of Illinois. Do I understand the gentleman to argue that if the legislature of a State fails to provide the mode and manner of an election for Congress, or if the governor refuses to order an election, the people are disfranchised, and can have no representation here?

Mr. BINGHAM. No, sir; I have stated the very contrary of that; but I have stated that they can have no representation except in pursuance of federal law or State law. That is my position exactly.

Mr. KELLOGG, of Illinois. Then if both the State legislature and Congress fail to provide the time, manner, and mode of election, the people are disfranchised?

Mr. BINGHAM. I have already intimated that they are not disfranchised, but cannot exercise their right to elect representatives to Congress without a law of their own legislature or of Congress. If those chosen in a State as its representatives prove disloyal, unfaithful to their trust, and turn traitors and engage in conspiracy against the rights of the people of the State and of the whole country, then, in the language of the "Declaration," the power of legislation, incapable of annihilation, returns to the people; but they must execute it first, assert their power of legislation if they would provide for an election of federal representatives in the absence of a law of Congress. Have they done it?

Mr. LOVEJOY. Does the gentleman contest the point that this is the action of the loyal people in Louisiana?

Mr. BINGHAM. No, sir; I have not contested that point at all, for I know nothing about, nor do I believe that any member of this house knows anything about that. If the people of Louisiana had, under an act of their own legislature, and by duly constituted officers of an existing State government, organized under the federal Constitution, held this election, I could not doubt that such election was the lawful act of the loyal people. But, sir, there is no organized constitutional State government in Louisiana, nor was this election held under the law or by the officers of such government of Louisiana, nor under a law of Congress. I therefore repeat my proposition: representatives can be elected to the federal legislature only in pursuance of an act of the State legislature, or of an act of the federal Congress. I wish to inquire when there has been any decision under the government of the United States, legislative or executive or judicial, to the contrary?

Mr. LOVEJOY. Well, when this governor was appointed for the very purpose of performing the duties of the governor who ought to have been there, I want to ask the gentleman what objection there is to his setting in operation this State legislation which existed when the State was loyal?

Mr. BINGHAM. Mr. Speaker, I should like to know of the gentleman from Illinois whence he derived his information that the military governor was appointed for the purpose of exercising the legislative functions of the State?

Mr. LOVEJOY. I did not say that. I said that he was appointed to discharge the duties of the civil governor. I suppose that is so. He was appointed by the military power, and derives the name of "military governor" simply because thus appointed; but the object was that he should discharge the duties of the governor regularly elected. Now, why cannot he put in *operation the State legislation* necessary to secure an election of representatives in *Congress?*

Mr. STEVENS. I should like to know from the gentleman under what part of the Constitution this military governor was appointed to discharge the civil duties of the governor of that State?

Mr. DAWES. I would like to know by what provision of the Constitution a man is appointed guard to a company of rebel prisoners, as they pass up Pennsylvania avenue?

Mr. BINGHAM. I object to being diverted from the subject of inquiry. I have asked the gentleman from Illinois, who has raised this question, whence he derived his information that any military governor has ever been appointed for Louisiana to exercise the powers of legislation?

Mr. LOVEJOY. I never made any such statement.

Mr. BINGHAM. Then the gentleman's question was aside from my argument, which is that a federal representative can only be elected in an organized State, and pursuant to an act of the legislature of the State or of an act of Congress.

Mr. LOVEJOY. No, sir.

Mr. BINGHAM. The gentleman will pardon me for saying that his suggestion was entirely aside from my argument. What I undertake to say here to-day is this: that no representative can be elected to the Congress of the United States except in pursuance of the legislation of a State, or of the legislation of the federal government. And in answer to the gentleman's suggestion, I wish to say further that a State election law, which by its terms requires State officers duly qualified to execute it, cannot be executed by a military governor appointed by the President.

Mr. LOVEJOY. My point is this: that either State or federal legislation being necessary, and there being no federal legislation, but there being State legislation, only no governor to put it into requisition, why cannot this military governor, who was appointed for that very purpose, put the State legislation in operation?

Mr. BINGHAM. Now, if my excellent friend had noticed what I said before, he would have had no occasion to ask his question at all, because that State legislation was repealed by the State legislature of Louisiana, and a provision was adopted, to which I have already adverted, requiring every elector in the district of Orleans to take the oath of allegiance to the Confederate States of America; and for the further reason that by the terms neither of the original statute of Louisiana nor of the treasonable statute of that State legislature could the election be held by a federal military governor. Assuming that the original election law of the legislature was not repealed, it prescribed the *manner* of its execution: and while that remains the law of the State it must be followed until altered or repealed, and can only rightfully be repealed or altered by an act of Congress, or by an act of the legislature of Louisiana.

The Constitution of the United States settles this. Its words are:

"The times, places, and *manner* of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, *by law*, make or alter such regulations, except as to the place of choosing senators."

Congress did not *by law* alter either of these election statutes of Louisiana; and no federal military governor or other executive officer of the United States can alter those statutes. This election was in no respect held in the manner prescribed by either of the Louisiana statutes.

Mr. LOVEJOY. Mr. Speaker——

Mr. BINGHAM. The gentleman must excuse me. I want to make plain the point.

Mr. LOVEJOY. So do I.

Mr. BINGHAM. Will the gentleman please excuse me?

Mr. LOVEJOY. I hope the gentleman will let me state——

Mr. BINGHAM. I understand my friend from Illinois perfectly; and I intend to make the matter so plain that he cannot mistake my meaning, however much he may differ with me in conclusions.

Mr. LOVEJOY. I want to know if that legislation is valid?

Mr. BINGHAM. I have answered the gentleman's question before. As against the rights of federal citizens, the treason enactment is void. As against the federal government it is void. As against the federal Constitution it is void. But I want to know if there is any man here who will stand up in his place and say that the people of a State may not, by law, if not of right, repeal all their laws on the subject of election; and I want to know how they are going to get rid of that repeal?

* * * I wish it understood that from the beginning of this argument to the end of it I have claimed that the loyal inhabitants in any organized State of the Union, even though a majority of its citizens be in insurrection against this government, have a right to their just proportion of representation in Congress. I want it understood, next, that in my judgment they cannot exercise that right of representation in Congress except by sending representatives here through the instrumentality of a State law appointing such elections, and in full force at the time, or in pursuance of a federal law. I understand that the legislature and people of Louisiana have not now, and had not when these elections were held, the law and the State officers necessary to hold a valid election for representatives in Congress. I understand, further, that Congress has not passed the necessary law. The question, therefore, is, whether there shall be representation without any law upon the subject? I deny that there

can be; and I deny it because the Constitution stands in the way, and because the power intrusted to representatives and senators in Congress is the highest power known to the sovereignty of the republic. It is the power of the whole people over the issues of life and death. It is a power, therefore, which should only be exercised as the Constitution has prescribed—under the forms and highest sanctions of law. Judges should receive the votes, should count them, and should certify to the result of the election, under the obligations of an oath, and under the penalties of law duly prescribed for a violation of that oath, in case they should violate it in any substantial particular.

The House agreed to the resolutions of the committee (February 17)—yeas 92, nays 44.

NOTE.—The debate will be found in volumes 47 and 48 of Congressional Globe. For the report: Mr. Dawes, vol. 47, page 831; ditto, vol. 48, page 1032; Mr. Maynard, vol. 47, page 855; Mr. Noell, vol. 47, page 861; Mr. Menzies, vol. 47, page 866; ditto, vol. 48, page 1011; Mr. Thomas, vol. 48, page 1015; Mr. Hahn, vol. 48, page 1030. Against the report: Mr. Voorhees, vol. 47, page 834; Mr. Porter, vol. 47, page 858; Mr. Eliot, vol. 47, page 860; Mr. Bingham, vol. 47, page 862; Mr. Yeaman, vol. 48, page 1012.

THIRTY-SEVENTH CONGRESS, THIRD SESSION.

CLOUD and WING, *of Virginia.*

Where there was a gross disregard of the legal requirements in holding an election, and but a small portion of the electors in a district had an opportunity to participate in the election, the committee and the House held that the election could not be recognized as valid.

IN THE HOUSE OF REPRESENTATIVES.

FEBRUARY 4, 1863.

Mr. DAWES, from the Committee of Elections, made the following report:

That the second district in Virginia is composed of the counties of Isle of Wight, Princess Ann, Norfolk county and Norfolk city, Nansemond, Surry, Sussex, Southampton, Greensville, Prince George, and Charles City. The election at which these gentlemen claim to have been elected took place on the 22d day of December, 1862, and resulted, according to the returns, in 645 votes for J. B. McCloud, 621 for W. W. Wing, 116 for L. C. P. Cowper, all others 20 votes—in all, 1,402 votes.

The constitution of Virginia, article 3, section 4, requires that "in all elections votes shall be given openly, or *viva voce*, and not by ballot, but dumb persons entitled to suffrage may vote by ballot."

The committee have been furnished by General Viele with the following return of election for a member of Congress to represent the second congressional district of Virginia, held on the 22d day of December, 1862, in pursuance of the proclamation of Major General Dix, commanding department of Virginia, and dated 8th day of December, 1862:

Precincts.	W. W. Wing.	J. B. McCloud.	L. C. P. Cowper.	Scattering.
Court-house, city of Portsmouth, Norfolk county	193	486	76	14
Capp's Shop precinct, Princess Ann county	72	2	.....	.....
Kempsville precinct, Princess Ann county	25	5	1	3
Tanner's Creek crossroads, Norfolk county	42	.....	.....	.....
City of Norfolk, Norfolk county	285	81	12	1
Suffolk precinct, Nansemond county	1	12	26	.....
St. Bride's Parish precinct, Great bridge, Norfolk county	3	59	1	2
Totals	621	645	116	20

Total number of votes polled, 1,402.
Duplicate.

EGBERT J. VIELE,
Brigadier General and Military Governor.

HEADQUARTERS MILITARY GOVERNOR,
Norfolk, Va., December 25, 1862.

It was claimed by Mr. Wing, and admitted by Mr. McCloud, that at the St. Bride Parish precinct, where fifty-nine votes were cast for Mr. McCloud and three for Mr. Wing, the voting was by ballot instead of *viva voce*; and that if these votes had been rejected in the count as illegal, being in conflict with the constitution of the State, that the result would have been 618 votes for Mr. Wing, and only 589 for Mr. McCloud, and that consequently Mr. Wing would be entitled to the seat. This is the basis of Mr. Wing's claim. The election is considered by both in all other respects legal and sufficient.

But the committee have carried their inquiries further than the decision of this point, and the result is such as to render its decision wholly unnecessary.

On the 8th day of December Major General John A. Dix, "commanding department of Virginia," issued the following proclamation calling for an election of a representative to Congress in this district on the 22d day of December:

PROCLAMATION.

Whereas there is reason to believe that a majority of the legal voters in the counties of Norfolk and Princess Ann, constituting the larger portion of the second congressional district of Virginia, are, and have always been, at heart loyal to the government of the United States, and obedient to the laws thereof; and whereas, in view of the proclamation of the President of the United States of the 22d of September last, it is desirable that the loyal portion of States in rebellion should have the opportunity of being represented in Congress on the first of January next:

Now, therefore, I, John A Dix, commanding the department of Virginia, do issue this my proclamation, declaring that an election by ballot shall be held on Monday, the 22d day of December instant, for a representative to fill a vacancy in the thirty-seventh Congress of the United States of America, in the 2d district of Virginia. Writs of election will be duly issued by Brigadier General Viele, military governor of Norfolk, and the elections held in the several precincts designated by law in the counties of Norfolk, Princess Ann, Nansemond, and Isle of Wight. The commissioners appointed, when duly notified, will appear and take the prescribed oath before the provost marshal, at the court-house in the city of Norfolk, or before the provost marshal at Suffolk.

All white males of the age of twenty-one years and upwards, actual residents of the district, who shall not have refused, heretofore, to give evidence of their fidelity to the government, shall be entitled to vote.

All persons entitled, and declining to vote, and who are not prevented by age, infirmity or other valid cause from performing their duty as citizens by voting under this proclamation, will be regarded as hostile to the government, and subject to all the penalties of disloyalty.

Given under my hand, at Fort Monroe, Virginia, this 8th day of December, 1862.

JOHN A. DIX, *Major General.*

And on the twelfth day of December Brigadier General Viele, military governor of Norfolk, issued the following proclamation:

HEADQUARTERS MILITARY GOVERNOR,
Norfolk, Virginia, December 12, 1862.

In accordance with the foregoing proclamation of Major General John A. Dix, commanding the department of Virginia, I, Egbert L. Viele, brigadier general and military governor of Norfolk, do appoint the following named persons as commissioners of election at the places named:

COUNTY OF NORFOLK.

Norfolk City precinct.—William R. Jones, James Simmons, Simon Stone.
Portsmouth City precinct.—Thomas W. Godwin, W. H. Lyons, W. F. Parker.
St. Bride's Parish precinct.—Richard E. Nash, Washington Hall, LeRoy R. G. Edwards.
Elizabeth River Parish precinct.—Peter Dilworth, George C. Cromwell, Hatton Williams.

PRINCESS ANN COUNTY.

Court-house precinct.—Newton Capps, Jeremiah Lane, Newton Hartley.
Kempsville precinct.—James Burroughs, Dr. E. D. Cornick, Dr. James E. Bell.

NANSEMOND COUNTY.

Suffolk precinct.—G. W. Singleton, Robert M. Darden, E. A. Wingate.

ISLE OF WIGHT COUNTY.

Smithfield precinct.—Alexander Ashburn, S. G. Darden, Colonel W. Watkin.

The commissioners will appear and qualify as above.

The returns will be duly authenticated, sealed, and delivered to me at these headquarters within three days subsequent to the election.

Given under my hand, at the city of Norfolk, this the 12th day of December, 1862.

EGBERT L. VIELE,
Brigadier General and Military Governor.

Francis H. Pierpoint, governor of the Commonwealth, issued writs of election bearing date December 12, 1862, of which the following is a copy:

To the sheriff, or any constable, or to any three freeholders in the county of Isle of Wight, Virginia:

Whereas the voters of the second congressional district of Virginia, composed of the counties of Isle of Wight, Princess Ann, Norfolk county, Norfolk city, Nansemond, Surry, Sussex, Southampton, Greensville, Prince George, and Charles city, failed to elect, on the 23d of May, 1861, a representative to the thirty-seventh (37th) Congress of the United States, and that you meet and make return, according to law, the third day thereafter.

You are hereby required, having first taken the oath or affirmation prescribed by existing laws, to hold an election to supply the vacancy aforesaid, at the several places of voting in Isle of Wight county, on Monday, the twenty-second day of December, 1862, or such other day as you may appoint, and of which you shall give due notice; and full authority is hereby conferred on you to do and provide whatever may be necessary for the purpose.

[L. S.] Given under my hand and the less seal of the Commonwealth, at the city of Wheeling, this twelfth day of December, 1862, and in the eighty-seventh year of the Commonwealth.

F. H. PIERPOINT.

By the Governor:
L. A. HAGANS,
Secretary of the Commonwealth.

Only four of these writs could be traced, and these were brought from Wheeling, the governor's residence, by "Adjutant General Samuels," to Norfolk, on the Saturday preceding the election, which was on Monday, and delivered, as stated to Mr. Wing, on Sunday, and by him delivered to the officers of four voting precincts before midnight of that day. When first issued, the writs called for an election on *Saturday*, the twenty-*seventh* of December; but they were afterwards altered by erasure to *Monday*, the twenty-*second* day of December. When, and by whom, or by what authority of law, these alterations were made is not known to the committee. The returns were made to the office of General Viele, in Norfolk, and the result there declared.

It is difficult to imagine a proceeding so entirely in disregard of the requirements of the law of this State as this election. Whether authority for it be sought in the proclamation of Major General Dix, "commanding the department of Virginia," or in that of Brigadier General Viele, "military governor of Norfolk," or in the writs of election issued by Francis H. Pierpoint, governor of the Commonwealth of Virginia, or in all three combined, it is equally in conflict with the plainest provisions of the law of the State. What territory in Virginia the "department of Virginia" embraces the committee are not informed; so that they are unable to say that it did or did not embrace the second congressional district. The committee are also ignorant of the source from whence General Dix obtained authority to call an election at all. He does not purport to call it as military governor, who is clothed to some extent with civil as well as military powers. The committee are not aware that General Dix assumes to discharge any other civil functions whatever. But the proclamation itself undertakes to prescribe the qualifications which alone would entitle a man to vote at this election, when the Constitution of the United States and of Virginia have fixed the qualification of voters for representative to Congress, and these qualifications cannot be added to or taken from.

Article 1, section 2, of the Constitution of the United States is as follows:

> The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature.

And the constitution of Virginia provides, article 3, section 1:

> Every white male citizen of the Commonwealth, of the age of twenty-one years, who has been a resident of the State for two years, and of the county, city, or town where he offers to vote, for twelve months next preceding an election, ***and no other person***, shall be qualified to vote for members of the general assembly.

And section 4 provides, as already cited, that "in all elections votes shall be given openly, or *viva voce*, and *not* by ballot."

A comparison of these several provisions with the proclamation of General Dix will show the departure and conflict without any comment or inquiry into the authority for issuing it.

The proclamation of General Viele seems to have been in aid of that of General Dix. It is issued by him as "military governor of Norfolk." The committee have failed to obtain the instructions to General Dix in this matter, and are equally ignorant of the extent of jurisdiction of the military governor of Norfolk. If anything can be learned from his title, it is confined either to the city or county of Norfolk. If that be so, he could hardly interfere in this election with the counties of Princess Ann, Nansemond, or Isle of Wight. But he not only appointed commissioners of election in the county of Norfolk, but also in the other counties already named, and required all from all these counties to make returns to "these headquarters within three days subsequent to the election." The statutes of Virginia require these commissioners to be appointed by the court of each county, and require them to make returns to the clerks of the county courts of their respective counties, and they to the clerk of the county of Isle of Wight, and he declares the result. But it seems that this proclama-

tion, like that of General Dix, was confined to four out of the eleven counties of this district. There is no authority of *law* for this selection, and it is supposed to have been induced by necessity, the remainder of the district being within the rebel lines. But whatever the reason, the House can at once see the danger if it were permitted. If certain counties may be selected in a district, and others omitted in the issue of writs of elections, then the control of the representation must rest with the power of selection. It should be sufficient, however, that the law does not sanction any such selection, and requires the issue of writs to the proper officers of all the counties.

But the writs of Francis H. Pierpoint, governor of the Commonwealth of Virginia, were also issued in this case, as has been already said. There were none of them sent to any county in the district except the four already named, and, therefore, all that has been said touching the same proceeding, under the proclamations of General Dix and General Viele, has equal force here. But these writs, although bearing date the 12th of December, and calling originally for an election upon Saturday, the 27th day of December, were first brought into the district on Saturday, the 20th, and delivered on Sunday, the 21st, to one of the candidates, for distribution, and then by erasions and insertions made at some time—the committee do not know when—they became writs for an election on the next day, that is on Monday, the twenty-second day of December, and they were so distributed that day. Now, it is expressly enacted by the statutes of Virginia that "every officer to whom a writ of election is directed shall, at least *ten days* before such election, give notice thereof, and of the time of the election, by advertisement at each place of voting in his county or corporation." With this plain and express provision of law before them the committee are at a loss for any explanation of the reason of delivering these writs on Sunday for an election the next day, except that given to the candidate at the time of their delivery by General Samuels, the messenger who brought them, as stated to the committee by Mr. Wing himself, viz: "*to give a semblance of legality to the election.*" Whatever may have been the reason for this proceeding, the proceeding itself will have a tendency to invoke the closest scrutiny on the part of the House into the regularity of each successive step in all elections held under the circumstances which attend this.

But turning from an examination of the conformity to legal requirements in this election to the question whether the voters of this district, conforming as nearly to law as possible, have, unrestrained and unawed by the presence of any considerable rebel force, had full and fair opportunity to express their choice of a representative, the committee find that but 1,402 votes in all were cast in a district usually polling about 10,000 votes; that of the eleven counties composing this district polls were opened in only four of them, and not in every precinct in these four, for the reason that they were in the armed occupation of the rebels. No polls could, therefore, be opened, and not a single voter—be the number what it may in this much the greater portion of the district—could cast a vote, or in any way have a voice in the selection of a representative. According to the uniform rule adopted by the committee and sustained by the House this has failed, in any just sense, to be the election of a representative from the second district in Virginia. The committee, therefore, report adversely upon the right of either claimant to the seat, and recommend the adoption of the accompanying resolutions:

Resolved, That J. B. McCloud is not entitled to a seat in this house as a representative from the second congressional district in Virginia.

Resolved, That W. W. Wing is not entitled to a seat in this house as a representative from the second congressional district in Virginia.

The House agreed to the resolutions of the committee without debate.

THIRTY-SEVENTH CONGRESS, THIRD SESSION.

McKenzie, *of Virginia.*

The statutes of Virginia having been violated in fixing the time of the election, and no election having been held in seven out of nine counties in the district, the committee and the House held that the election was not valid.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 9, 1863.

Mr. DAWES, from the Committee of Elections, made the following report:

That said district is composed of the counties of Spottsylvania, Alexandria, Fairfax, Fauquier, Prince William, Rappahannock, Culpeper, Stafford, and King George. The election at which Mr. McKenzie claims to have been elected was held on the fifteenth day of January of the present year. The committee have been furnished with the following statement of the result, which they have no doubt is correct:

Statement of the result of the special election held in the counties composing the seventh congressional district of Virginia, on the fifteenth day of January, in the year one thousand eight hundred and sixty-three, for a representative in the thirty-seventh Congress of the United States, to fill a vacancy existing therein.

Candidates.	COUNTIES.		Total.
	Alexandria.	Fairfax.	
Lewis McKenzie	207	20	227
Andrew Wylie	54	161	215
Charles H. Upton	36	35	71
Chauncy H. Snow	30	9	39
Gilbert S. Miner	.....	2	2
Total result	327	227	554

Total number of votes, five hundred and fifty-four 554
Majority for Lewis McKenzie, twelve 12

No returns have been received from eight counties; presume that no polls were opened in said counties.

Teste: JEFFERSON TACEY, *Clerk.*

A copy of a certificate of the result accompanies this report, which constitutes Mr. McKenzie's credentials. The election was held under writs of election issued by Governor Pierpoint, bearing date December 13, 1862, of which the following is a copy:

To Thomas J. Edlen, special commissioner for Alexandria county:

Whereas the voters of the seventh (7th) congressional district of Virginia, composed of the counties of Alexandria, Spottsylvania, Fairfax, Fauquier, Prince William, Rappahannock, Culpeper, Stafford, Orange, and King George, failed to elect a representative to the thirty-seventh (37th) Congress of the United States on the 23d of May, 1861, you are hereby required, having first taken the oath or affirmation prescribed by existing laws, to hold an election to supply the vacancy aforesaid, at the several places of voting in Alexandria

county, on Wednesday, the 31st day of December, 1862, or such other day as you may appoint, and of which you shall give due notice; and full authority is hereby conferred on you to do and provide whatever may be necessary for the purpose.

Given under my hand and the less seal of the Commonwealth, at the city of [L. S.] Wheeling, this thirteenth day of December, 1862, and in the eighty-seventh year of the Commonwealth.

F. H. PIERPOINT.

By the Governor:
L. A. HAGANS, *Secretary of the Commonwealth.*

These writs ordered an election upon the 31st day of December, 1862, "*or such other day as you may appoint.*" They were not delivered in the district till the evening of the 21st of December. The statutes of Virginia (Code, ch. 7, sec. 17) require "each officer to whom a writ of election is directed shall, at least *ten days* before such election, give notice thereof, and of the time of the election, by advertisement, at each place of voting in his county or corporation." It became an impossibility to give the required notice for the 31st after the receipt of these writs, on the night of the 21st. Accordingly, the person to whom the writ for Alexandria county was directed, and the person to whom that for Fairfax county was directed, met on a subsequent day, and fixed upon the 15th of January for the election, and gave the notices in their respective counties accordingly. The only authority for this alteration of the time is in the writ itself, as follows: "or such other day as you may appoint." No authority of law for giving any such power to the commissioners was shown or claimed before the committee; on the contrary, the statutes of Virginia (Code, ch. 7, sec. 16) expressly declares that the writ "shall prescribe the day of election to be the same throughout the district." The committee are of opinion that this power, thus fixed by law in the governor, cannot be by him delegated to any one else; and for this reason the election held on the fifteenth of January was without any sanction of law. If it were possible that this power could be delegated, still the committee find that the day was agreed upon by the commissioner of Alexandria and of Fairfax counties alone, without regard to those in the seven other counties composing the district. The law is imperative that the day shall be the same throughout the district; yet if the commissioners in any two of the counties can fix upon a day, the same may be done by any other two, and the utmost confusion would be certain to ensue. The committee were unable to sanction any such proceeding.

On the 23d of January, eight days after this election was held, the legislature of Virginia passed the following act:

AN ACT providing for the return of the special election for a representative in the seventh congressional district, held on the 15th day of January, 1863.—*Passed January* 23, 1863.

Be it enacted by the general assembly, That the clerk of the county court, authorized by law to make returns of the elections held on the 15th day of January, 1863, for a representative in Congress for the seventh district, be, and is hereby, authorized and required to ascertain the result, and grant certificates therefor at any time within the thirty days allowed therefor.

2. This act shall be in force from its passage.

I, Gibson L. Cranmer, clerk of the house of delegates and keeper of the rolls, do hereby certify that the above is a correct copy of "An act for the return of the special election for a representative in the seventh congressional district, held on the 15th day of January, 1863," as enrolled, and in my possession.

Given under my hand this 27th day of January, 1863.

GIBSON L. CRANMER,
Clerk of the House of Delegates and Keeper of the Rolls.

It was claimed by Mr. McKenzie that this legislation ratified and confirmed the action of these two commissioners in fixing upon the 15th of January for holding this election. But the committee were of opinion that the act had reference wholly to the time of making a return, and simply authorized the ascertainment and declaration of the result in less time than thirty days—the

time required before the passage of the act. And, furthermore, if the legislature had undertaken to ratify or confirm an election held without authority of law, the act would so far have been of no effect; and it would be just as competent for the legislature to now enact by statute that Mr. McKenzie is the lawful representative of the district as to make legal by statute an election for which, when held, there was no authority of law.

But the committee went further, and inquired, as in all other cases, into the character of the election itself, and find that, in point of fact, there was no election in seven out of the nine counties composing this district; that an election in nearly all the other counties would have been an impossibility, for they are all, with a trifling exception, in the armed occupation of our own and the rebel armies, mostly of the rebel army. It appeared that a writ for this election reached the sheriff or other proper officer of Prince William county, who was the next day himself arrested by the rebels, and taken with his writ to Richmond, where he is now confined in prison. However loyal the people of these counties may be, they have had no opportunity to testify that loyalty at the ballot-box. While seven-ninths of the district is under duress, the action of the other two-ninths can never be taken as the choice of the district. At the election in 1857 for representatives, this district cast 9,273 votes, and is believed to have been larger in 1859. On this occasion there were cast, in all, only five hundred and fifty-four votes; of which Mr. McKenzie had only two hundred and twenty-seven. That a large part of the voters are absent from the district is very probable; but until the opportunity can be given those who remain, be they many or few, to vote, there can, in the nature of things, be no election. According to all the precedents laid down by the committee, and adopted by the House, they are compelled to report against the validity of this election. They therefore recommend the adoption of the accompanying resolution:

Resolved, That Lewis McKenzie is not entitled to a seat in this house as a representative from the seventh congressional district in Virginia.

The resolution was adopted.

THIRTY-SEVENTH CONGRESS, THIRD SESSION.

RODGERS, *of Tennessee.*

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 9, 1863.

Mr. DAWES, from the Committee of Elections, made the following report:

That Mr. Rodgers claims to have been elected to this house in November, 1861, from a district in Tennessee, made up in part of the counties embraced in the district now represented by Mr. Maynard, (the 2d,) and in part of counties embraced in the district now represented by Mr. Clements, (the 4th.) These gentlemen were elected in August, 1861, and subsequently to their election, the committee are informed by Mr. Rodgers that the State was redistricted by the rebel legislature for the so-called Confederate Congress, and an election in these new districts was held for the Confederate Congress in November following. It is claimed by Mr. Rodgers that at this election votes were cast for him as a representative to this Congress; and it is by virtue of these votes that he now claims a seat. All the evidence submitted by Mr. Rodgers in support of his claim accompanies this report. The committee have found no foundation for

the claim, and, referring the House to the accompanying papers, do not deem further comment necessary. They accordingly report the following resolution:

Resolved, That John B. Rodgers is not entitled to a seat in this house as a representative from the State of Tennessee.

The resolution was agreed to without debate or division.

THIRTY-SEVENTH CONGRESS, THIRD SESSION.

JENNINGS PIGOTT, *of North Carolina.*

A majority of the counties of the district were occupied by armed rebels. The election was held to be invalid.

To be an *inhabitant* of a State is, if not to be a *resident* or *citizen*, something more than to be *a sojourner.*

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 14, 1863.

Mr. DAWES, from the Committee of Elections, submitted the following report:

That they have heard the said Pigott in support of, and the said Foster against, said claim, and have examined all the testimony which has been adduced on either side. It is claimed by Mr Pigott that he was elected upon the first day of January of the present year, by virtue of a proclamation (Mis. Docs. Nos. 13 and 14) issued by Edward Stanly, military governor of North Carolina, on the tenth day of December last, in the second district of North Carolina, composed of the counties of Wayne, Edgecomb, Green, Pitt, Lenoir, Jones, Onslow, Carteret, Craven, Beaufort, and Hyde.

The view taken by the committee of all the facts of this case, as they were made to appear, rendered it unnecessary to inquire how nearly in conformity to the forms of law this election had been conducted, or what were the powers of the military governor who issued the proclamation under which it was held. For this reason they do not trouble the House with citations from the North Carolina law of elections, or with arguments upon the powers of a military governor. The whole number of votes cast was 864; of these Mr. Pigott had 595 votes; all others, 269 votes. There was no voting at all in but three of the eleven counties composing the district, and in one of these in but a single precinct. There were many voting places in these three counties where no polls were opened or notice taken of the election. In some of these no sufficient reason was shown why they were omitted from participation; but in most of them in these three counties the presence of armed rebels and incursions of guerillas rendered the attempt wholly impossible. The remaining eight counties were almost, if not entirely, in the armed occupation of the rebels. It was frankly admitted by Mr. Pigott that the number of loyal voters in the district who, for this reason, had no opportunity to cast their votes at all, was greater than the number who had any such opportunity. According to the rules adopted by the committee in all similar cases, and steadily adhered to by the House, this puts an end to the case. Mr. Pigott can in no just sense be deemed the choice of the loyal voters of a district in which more than half of them had no opportunity to express that choice. Voters may voluntarily stay away from the polls, and they are thereby taken and deemed to have acquiesced in what was done by those who are present. But no such presumption rests upon those who are under duress; and it can never be known that they would not have made choice of another if the iron grasp of the rebellion had been unloosed.

It was claimed that Mr. Pigott was not, at the time of the alleged election, an *inhabitant* of North Carolina, and therefore not eligible to the office of representative within the meaning of the second section of the first article of the Constitution of the United States, which provides that "no person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not when elected be an inhabitant of the State in which he shall be chosen."

Mr. Pigott, although a native of North Carolina, had resided in the city of Washington for the last ten or eleven years, owned real estate here, dwelt with his family in his own house here, and had on more than one occasion voted here for municipal officers. After Mr. Stanly was appointed military governor of North Carolina, Mr. Pigott was appointed his private secretary, and, renting his house in Washington, went to North Carolina in that capacity, and had remained there as such private secretary two or three months when this election took place. He had done nothing since his return to the State to indicate a permanency of abode there beyond what is here stated. The committee are of opinion that to be an *inhabitant* within the meaning of this section of the Constitution, if it does not mean *resident* or *citizen*, certainly means more than *sojourner*, which is all that can be claimed for Mr. Pigott. In the case of John Bailey, (Contested Election Cases, 411,) who was elected a representative from Massachusetts while a clerk in one of the departments in Washington, where he had been for six years, although a native of Massachusetts, it was decided that he had ceased to be an *inhabitant* of Massachusetts within the meaning of the Constitution. And the able report of the committee in that case, adopted by the House, defines the word *inhabitant*, in this connexion, to be "a *bona fide* member of the State, subject to all the requisitions of its laws and entitled to all the privileges and advantages which they confer." In the opinion of the committee, the sojourn of Mr. Pigott in North Carolina, for the temporary and transient purpose of being private secretary to a military governor, was not an inhabitancy within this definition.

For these reasons the committee report against the right of Mr. Pigott to a seat in this house as a representative from North Carolina, and recommend the adoption of the following resolution:

Resolved, That Jennings Pigott is not entitled to a seat in this house as a representative from the second congressional district in North Carolina.

A very brief debate occurred in the House upon this case, which will be found in vol. 47, Congressional Globe, pages 1210 and 1211.

The House agreed to the report without a division.

THIRTY-SEVENTH CONGRESS, THIRD SESSION.

Mr. GRAFFLIN, *of Virginia.*

The governor of Virginia must fix the time of an election to fill a vacancy, and cannot delegate that power to another.

The election was partial, and not valid.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 23, 1863.

Mr. DAWES, from the Committee of Elections, submitted the following report

That said district is composed of the counties of Frederick, Page, Warren Clarke, Berkeley, Jefferson, Hampshire, Morgan, and Loudon. Writs of election were issued by the governor of the Commonwealth, bearing date the

13th of December, 1862, ordering an election of representative in this district on the 31st of said December. These writs were placed in the hands of Mr. O. D. Downey, who was instructed to visit the district and determine, from actual observation, whether the district was in a condition to hold an election at the time fixed in the writ; and if, from the presence of rebels or other causes connected with the war, he should deem an election at that time impracticable or unsafe, to appoint such other day as, in his judgment, would be, under all the circumstances, most suitable and proper. On the arrival of Mr. Downey in the district he found the condition of the people so unsettled (a strong force of the enemy occupying several of the counties, and in the immediate neighborhood of others, threatening those desirous of exercising the elective franchise) that he deemed an election upon the day fixed in the writ wholly impracticable. He accordingly fixed upon the 5th of January, 1863, as the time for holding this election. At that time there were cast in the county of Morgan 158 votes for Mr. Grafflin, and 58 for Joseph S. Wheat; in the county of Berkeley 115 votes for Mr. Grafflin; and in the county of Hampshire 69 votes for Mr. Grafflin, and 2 votes for Mr. Wheat; 342 votes, in all, for Mr. Grafflin, and 60 votes for Mr. Wheat—a total of 402 votes. No votes were cast in any other county, and in but two precincts in Hampshire and one in Berkeley. In the counties of Frederick, Page, Warren, Clarke, Loudon, and Jefferson, six out of the nine composing the district, there were no votes cast. Of some of these counties the rebels had armed occupation, and into others guerilla bands were constantly making incursions, filling the people with terror, and threatening with imprisonment all who should participate in this election. To open the polls under such circumstances in these counties would have been worse than a farce: it would have been an invitation to the rebels to visit with violence the peaceful and loyal citizens so situated that our forces could not protect them.

This case comes within the precedent established in the recent case of Lewis McKenzie claiming a seat as a representative from the seventh district in Virginia by virtue of an election precisely similar to this. The laws of Virginia require the governor to fix in his writ the time for holding an election to fill a vacancy, and nowhere authorize him to delegate that power to another.

The election itself, had the day upon which it was held been authorized by law, like that in the case of McKenzie, already alluded to, was not a general election in the whole district, but only a partial and imperfect one, in which much the largest portion of the voters of the district took no part and had no opportunity to take part. No notices were served and no polls opened; and if there had been, no voter could, with safety to his property, his liberty, or his life, have voted in much the largest portion of the district. The committee regret that they cannot find any ground for pronouncing this an election in any just sense of that term. After a careful revision of the decision to which they arrived in the case of McKenzie, already stated, which was sustained by the House, they see no occasion to question its correctness, and they therefore report the accompanying resolution, and recommend its adoption:

Resolved, That Christopher L. Grafflin is not entitled to a seat in this house as a representative from the eighth congressional district of Virginia.

The House agreed to the report without a division.

THIRTY-SEVENTH CONGRESS, THIRD SESSION.

HAWKINS, *of Tennessee.*

There was nonconformity to law, and a partial election: it was therefore held not valid.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 28, 1863.

Mr. DAWES, from the Committee of Elections, made the following report:

The ninth congressional district in Tennessee is composed of the following counties, viz: Carroll, Dyer, Gibson, Henderson, Henry, Lauderdale, Obion, Tipton, and Weakley, nine in number. This election was held on the 29th of December, 1862, pursuant to writs of election issued by Andrew Johnson, military governor of Tennessee, and the result appears in the several papers which accompany this report, and which constitute the credentials of Mr. Hawkins. The statement of Mr. Hawkins himself, in support of his claim, also accompanies this report.

The history of the efforts of the loyal voters in this district to secure representation in Congress, resulting as appears in these credentials, is peculiar.

This history appears in the very fair and candid statement of Mr. Hawkins, made to the committee, which accompanies this report. The first effort was entirely spontaneous, the voters speaking through a convention voluntarily assembling in very respectable numbers, and acting entirely from its own impulses, and according to its own regulations. This convention appointed the 13th of December the time for holding this election, "unless the governor, prior to that time, issued writs of election," nominated Mr. Hawkins as its candidate, and set in motion the machinery of a canvass. The district was at this time comparatively free from armed rebels, and the people seemed, in all parts of the district, to be moving with alacrity and earnestness to assert this the highest privilege of the citizen. Just before the 13th, however, the proclamation of Governor Johnson, and corresponding writs of election, arrived in the district, ordering an election on the 29th instead of the 13th December. The attempt was made to communicate this proclamation and these writs to all the counties in the district before the 13th of December, but in several of the counties it failed, and in these an election was held in accordance with the resolution of the convention. The votes were almost entirely for Mr. Hawkins, but how many were cast it is impossible to ascertain; and it is equally unnecessary, for it is not upon this election that Mr. Hawkins relies for his right to a seat here, and he has accordingly furnished no evidence of the number of votes cast at that time. But from the evidence before the committee it was apparent that had there been no interruption there would have been, at that time, a spontaneous election in that district, so general and full, approaching so nearly to an expression of the whole people, that a new and highly interesting, as well as difficult, question would have presented itself for decision. But on the 29th of December, the time at which the election was ordered by Governor Johnson, quite a different state of things existed in the district. The proclamation of Governor Johnson became known to the rebels, and, in order to prevent the holding of this election, the rebel General Forrest made a raid into this district just before the 29th, and on the day of the election occupied almost all of it, except a small portion from which the returns have been presented, and which accompany this report. The Union forces also marched into the district to

meet him, and General Hurlburt issued a military order postponing the election to some future day. Between the Union and the rebel armies every part of the district was either under the armed occupation of contending armies, or in such a state of commotion that freedom of election became an impossibility.

Where the military order of General Hurlburt postponing the election did not reach, attempts were made to vote. A battle was fought on the very day on which the election was to be held, and in sight of the polls. One sheriff was seized by the rebels, his writs of election taken from him and destroyed, and he compelled to give bond not to hold an election at all, and to destroy any returns which were sent to him. Mr. Hawkins himself was driven from the district and State, and only returned after the day of the election at the greatest peril. On his return he gathered up himself, as well as he was able, such returns as are here presented, and procured from the general commanding at that post (General Sullivan) "special order No. 29," which accompanies this report as a certificate.

Too much praise cannot be awarded the Union men of that district for their constant and unwavering devotion to the cause of their country through suffering and peril which none but heroes would endure without complaint; and in all the qualities for which this people command our admiration, Mr. Hawkins has shown himself to be their fit representative.

The committee have struggled to find some way to give effect to this effort to secure representation; but they have not been able to bring it within any of the rules adopted by the House in determining the election cases which are analogous to this. How far the election was conducted at the polls in conformity to the law of Tennessee it has been impossible to ascertain. No one would expect to find or should require rigid conformity under the peculiarly trying circumstances under which this attempt was made. But the evidence of any votes at all will be seen, by a reference to the accompanying papers, to be of the most vague, uncertain, and unsatisfactory character. The committee have but to call attention to one or two of these papers. An unofficial person, A. G. Shrewsbury, certifies that he has seen the return of votes in Henderson county, and that "there were over seven hundred votes polled in that county, over seven hundred of which were for Alvin Hawkins, and the balance, numbering some twenty or thirty, were scattering, and for other persons." This comes, so far as appears, from a private citizen, and has not even the sanction of an affidavit. In no sense can it be taken as evidence. Of a similar character is what purports to be a return from Chestnut Bluff, a precinct in Dyer county, to which the committee call attention. These papers are the bases of the certificate of General Sullivan. The law requires all the returns to be made to the governor, and he is to make the certificate. It was impossible for this to be done, and Governor Johnson has furnished nothing. The committee are of opinion that it would be a very unsafe precedent, sure to be fruitful of mischief, to take, as evidence of an election, the papers here presented. Mr. Hawkins himself was driven from the district and has no personal knowledge of the facts. He has letters from highly respectable citizens corroborating, to some extent, these papers; and while, as matter of fact, the House may not doubt that these transactions have taken place, yet it would be most dangerous to take, as legal proof of an election, the papers here presented.

Although the evidence, as far as it goes, tends to show that 1,900 votes were cast, nearly all for Mr. Hawkins, yet it also appears that a very small part of the district participated in this election. Some parts had already voted on the 13th; some had postponed still further the day of election, under the military order of General Hurlburt, but more was at the very moment under the control and occupation of contending armies in battle array, in which an election was an impossibility. Under these circumstances, if it be taken as satisfactorily shown that 1,900 votes were polled, that fact must be taken along with the

other that they were polled in a very small part of the district, and that much the greater portion of it, for the reasons stated, had no part or lot in the matter. The district at the last election for representative cast 18,000 votes.

The committee are again compelled to come to the same conclusion they have reluctantly arrived at in other cases, adverse to the right of Mr. Hawkins to a seat in this house upon the state of facts presented to them, and which they herewith report. They accordingly recommend the adoption of the accompanying resolution:

Resolved, That Alvin Hawkins is not entitled to a seat in this house as a representative from the ninth district in Tennessee.

The resolution was agreed to March 3, 1863, without debate or division.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

Committee of Elections.

Mr. DAWES, Massachusetts.
VOORHEES, Indiana.
BAXTER, Vermont.
SMITH, Kentucky.
GANSON, New York.
Mr. SCOFIELD, Pennsylvania.
SMITHERS, Delaware.
UPSON, Michigan.
BROWN, Wisconsin.

McKENZIE *vs.* KITCHEN, *of Virginia.*

A large part of the district not participating in the election, it being at least partially within the military control of rebels, the election was not recognized as valid.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 8, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

That they have had said credentials and memorial under consideration, and have examined proofs and heard the statements and arguments of both the gentlemen claiming to have been duly elected as the representative from this district, and find the facts to be as follows:

The memorial of Mr. McKenzie is in Miscellaneous Document No. 12, and Mr. Kitchen's credentials are annexed to this report. These gentlemen claim to have been elected on the fourth Thursday of May last, the day prescribed by law for holding elections for State officers and representatives in Congress. The State was divided into districts for the election of representatives in Congress, in conformity to the act of Congress upon that subject, by the legislature of Virginia, on the 30th day of January, 1863, and by that act this district was composed of the counties of Alexandria, Berkeley, Frederick, Shenandoah, Jefferson, Clark, Warren, Loudon, Fauquier, Fairfax, and Prince William. The following is the result of that election, as far as known:

SEVENTH CONGRESSIONAL DISTRICT.

For Lewis McKenzie.—Alexandria, 252; Fairfax, 175; Prince William, 49; Loudon, 205; Jefferson, (Harper's Ferry,) 33; Berkeley, 2. Total, 716.

For B. M. Kitchen.—Alexandria, 61; Fairfax, 120; Jefferson, (Shepherdstown,) 51; Berkeley, 730. Total, 962.

For Upton.—Alexandria, 40; Fairfax, 55; Loudon, 8; Jefferson, (Shepherdstown,) 1; Berkeley, 7. Total, 111.

For Gallagher.—Alexandria, 11; Loudon, 2; Jefferson, (Harper's Ferry,) 252; Berkeley, 3. Total, 268.

For Minor.—Alexandria, 1. Total, 1.

For Massey.—Alexandria, 1. Total, 1.

From this result it appears that if all the votes thus cast were taken into the account as duly cast for representatives in Congress for this district, Mr. Kitchen received a plurality of two hundred and forty-six votes over Mr. McKenzie, and if there were no other objections, would be entitled to the seat. But the claimant, McKenzie, by his notice of contest, (Miscellaneous Document No. 12,) contends that Berkeley county, wh re Kitchen received a large vote, and without which he would be in a small minority, was, on the day of election, no part of the seventh congressional district of Virginia, but was at that time a part of West Virginia. and consequently not entitled to vote for a representative in this district. This claim is founded on the following legislation, viz:

An act of the legislature of Virginia passed May 13, 1862, giving consent of that State to the formation of a new State within the jurisdiction of the State of Virginia, the second section of which provided "that the consent of the legislature of Virginia be, and the same is hereby given, that the counties of *Berkeley*, Jefferson, and Frederick shall be included in and form a part of the State of West Virginia, whenever the voters of said counties shall ratify and assent to the said constitution at an election held for that purpose at such time and under such regulations as the commissioners named in said schedule may prescribe;" an act of Congress passed December 31, 1862, admitting West Virginia into the Union; an act of the legislature of Virginia passed January 31, 1863, giving further consent of that State to the admission of Berkeley county into the State of West Virginia; and an act passed by West Virginia August 5, 1863, admitting the county of Berkeley, and making it a part of that State.

Under the first of these acts of the State of Virginia it does not appear that anything was done by the voters of Berkeley, Jefferson, and Frederick, to "ratify and assent to the said constitution" of West Virginia, as provided in that act; and if not, of course the act had no effect in transferring the county of Berkeley to West Virginia. If they did proceed to "ratify and assent" as therein required, still neither of these counties is embraced in the act of Congress admitting West Virginia, passed December 31, 1862. The second act of the State of Virginia, giving further assent to the admission of Berkeley alone into the State of West Virginia, passed January 31, 1863, was dependent for its effect upon two conditions precedent contained in the act itself: First, that on the fourth Thursday of May, 1863, a majority of the voters of Berkeley should so decide. And secondly, that the legislature of West Virginia, after this result is certified to it by the governor of Virginia, shall admit the same into the State of West Virginia. The language of the statute is as follows: "If a majority given at the polls opened and held pursuant to this act be in favor of the said county of Berkeley becoming a part of the State of West Virginia, then shall the said county become a part of the State of West Virginia *when admitted into the same with the consent of the legislature thereof.*" Now, the consent of the legislature of West Virginia to the admission of the county of Berkeley into that State was not given until August 5, 1863; (see act of the legislature of West Virginia of that date.) Until that day, therefore, it was no part of the new State. By no construction, then, can it be held that on the 28th day of May, when this election was held, Berkeley was a part of West Virginia. But there is a further objection to this claim of Mr. McKenzie. The act of Congress admitting West Virginia into the Union enumerates the counties of the old State which shall compose the new one—and Berkeley is not one of them. Congress has never consented to the transfer of the county of Berke-

ley from the one State to the other, and without that consent it cannot be done. Berkeley county is, therefore, still a part of the old State of Virginia. The vote of Berkeley county must consequently be counted in the result, unless there be some other and valid objection to it.

In his notice of contest, given by Mr. McKenzie to Mr. Kitchen, he further contests the votes of Berkeley county on account of alleged informality in the conducting of the election and making the returns. The only irregularity shown consisted in the fact that the commissioners of election in Berkeley county certified the result directly to the clerk of Alexandria county, instead of certifying it to the clerk of Berkeley county, who is required by law to record it in a book and send a certified copy of it to the clerk of Alexandria county. The commissioners of Berkeley certified the result as follows—appending to the certificate the reason for so doing—the truth of which was not disputed:

MARTINSBURG, BERKELEY COUNTY, VIRGINIA, *May* 30, 1863.

We, George Sharer, Elias M. Pitzer, and John W. Pitzer, commissioners at the court-house of said county, do certify that we caused an election to be held in said county, on the 28th day of May, 1863, for governor, lieutenant governor, attorney general, State senator, two delegates in the general assembly, and a member of Congress for the seventh congressional district, and that the following is a true return of the votes cast at said election, to wit:

For Governor.—F. H. Pierpoint, six hundred and ninety-five votes.

For Lieutenant Governor.—Gilbert S. Miner, five hundred and fourteen votes; Philip C. Pendleton, one hundred and thirty-five votes.

For Attorney General.—S. F. Beach, two hundred and fifty-eight votes; Thomas R. Bowden, three hundred and forty-eight votes.

For State Senator.—Joseph A. Chapline, six hundred and fifty-eight votes.

For Congress of the United States.—B. M. Kitchen, seven hundred and thirty votes; Lewis McKenzie, two votes; Charles H. Upton, seven votes; John S. Gallagher, three votes.

For House of Delegates.—Robert Lamon, one hundred and eighty-two votes; John W. Daily, one hundred and seventy-one votes.

Given under our hands this 30th day of May, 1863.

GEORGE SHARER,
ELIAS M. PITZER,
JOHN W. PITZER.
Commissioners.

To the CLERK of Alexandria County Court, or to
L. A. HAGANS, *Secretary of the Commonwealth of Virginia.*

MAY 30, 1863.

The undersigned, commissioners, named in the foregoing certificate, hereby state that there is no clerk of the county court of Berkeley county, the county officers, including said clerk, elected last year, having failed to qualify: that the records of the office have been removed; that the office and court-house are occupied by the United States military; and that it is impossible, therefore, to certify to the "clerk" of the said county court of Berkeley the result of the election, and consequently the law cannot be literally complied with, which requires said "clerk" to record said return in a book in his office, and to transmit a "certified" copy of such result to the clerk of "the county first named in the law."

GEORGE SHARER,
ELIAS M. PITZER,
JOHN W. PITZER.

It was not contended that any fraud was committed, or that the true result in Berkeley was not here certified, and therefore the committee were of opinion that the votes should be counted. This determines the result as to Mr. McKenzie. If these votes were counted he did not receive a plurality, and would not, in any event, be entitled to the seat.

The question then recurs, has Mr. Kitchen, who received a plurality of all the votes cast, been elected? According to the precedents heretofore established in similar cases, and already adopted by this committee in the case of

Joseph Segar, the answer to that question will depend upon the condition of those parts of the district in which no election was held, and the relative proportion which those parts bear in population to that part of the district in which the polls were opened and elections held. A recurrence to the returns will show that an election was held in Alexandria, Fairfax, Loudon, and Berkeley, and polls were opened at two places in Jefferson, and one in Prince William; while there was no election in Frederick, Shenandoah, Clark, Warren, Fauquier, and the other precincts of Jefferson and Prince William. The population in 1860 of Alexandria, Fairfax, Loudon, and Berkeley, where there was a general election, was 58,785; while that of Frederick, Shenandoah, Clark, Warren, and Fauquier, where there were no polls opened at all, was 65,736. If the population of the two counties—Prince William, where one poll only was opened, and Jefferson, where two only were opened—be divided equally between the represented and unrepresented portions of the district, the result would be that the aggregate population in the former would be 70,341; in the latter, 77,292. A division of the entire free population by the same lines will show, in that portion in which elections were held, a free population of 55,530; in that where no election was held, 55,561. Of free white males, there were in the former 25,568, and in the latter 26,161.

All are familiar with the condition of this district since the breaking out of the rebellion. It is the district immediately opposite the District of Columbia, on the south side of the Potomac. It has been more than any other district the theatre of the war, and has been ravaged and devastated by contending armies, till its condition is deplorable. Even that part of it now within the federal lines is constantly exposed to raids from the enemy, and its inhabitants pillaged and taken prisoners, or driven from their homes to seek shelter under the guns of our forts, or within the District of Columbia. While this case was being heard by the committee, the house of Mr. Kitchen, one of the claimants in Berkeley, was surrounded in the night-time by guerillas and sacked, while he, escaping in the darkness, is here a fugitive. On the day of this election, more than one-half of this district, in territory and in population, was in the armed occupation of the enemy; and much more was disputed ground, sometimes in the possession of one, and sometimes in that of the other side. And the question presented by the case is, whether in a district so situated the House can treat as the choice of the district, duly elected, the person receiving a plurality of the votes cast, under the circumstances which existed there.

The committee found some difficulty in coming to a decision upon this question; but the conclusion to which they have arrived, after a careful consideration, they now submit to the House.

The case comes so near to what seems to be the dividing line, as established by the precedents of the last House in similar cases, and the judgment of this committee in the case of Joseph Segar, heretofore reported to the House, that the difficulty lies in determining upon which side of that line it falls.

It will be seen that between that part of the district where polls could be and were opened, and the part held by the enemy, there is very nearly an equal division, whether it be divided by territorial limits, by the aggregate of population, the entire free population, or the white male population. In each division the part within the occupation and control of the enemy is a trifle the greatest, but it may be treated practically as about an equal division of the district between the rebels and the Union forces. But it should not be overlooked, that while that portion under rebel control is held so by force of arms and the presence of rebel bayonets, it is equally true that the remainder of the district is, as yet, within our lines, and under our sway, only by a like force of arms and presence of loyal troops. If the Union forces were withdrawn from any portion of the district, it would be immediately overrun by rebel armies. Practically, the seventh congressional district of Virginia, the scene of some of

the fiercest and bloodiest conflicts of arms in the whole war, is still a battle-ground.

The present condition of that portion of it within the Union lines little fits it for the free exercise of the elective franchise. Martial law and military discipline, if not incompatible with, are certainly, at best, poor instrumentalities for ascertaining the choice of freemen. Off against this portion of the district thus selected, and thus held, must be set quite as large if not a larger portion in territory, in population. or in voters, which all the time has been held bound in the chains of an armed enemy, overrun with a hostile army, and ground into the dust by the heel of a usurped power.

The committee have, in this state of the facts, come to the conclusion that this case comes within the precedents of the last Congress, which have been adopted by the committee in the case from the first district of Virginia, already reported to the House. They cannot satisfy themselves that there has been such a freedom of election in this district as to warrant the conclusion that Mr. Kitchen is the choice of the loyal voters of the whole district. However near to a majority of such voters those came who participated in this election, yet it appears to the committee that a greater portion failed to participate in it for the reason that they were held under the power of the rebel army, and therefore by no method can it be shown that the claimant is the choice of the Union voters of the whole district. It may not be improper to call attention to the fact that while the whole number of votes cast was 2,059, only 962 of these were cast for Mr. Kitchen; and that of those, 730 were cast in the county of Berkeley, where Mr. Kitchen now resides, a county which, on the same day that these votes were cast, voted also unanimously to attach itself to West Virginia, and which has, so far as the legislature of both States can effect it, been made a part of the new State, and separated from this district altogether. Although, for reasons already stated, this can have no legal effect upon the vote to its exclusion, yet it is a circumstance which, if it can have any effect, certainly will not lead to the conclusion that Mr. Kitchen would have been the choice of the other counties whose voters were not permitted to participate at all in the election.

For these reasons, the committee are of opinion that neither Mr. Kitchen nor Mr. McKenzie are entitled to the seat, and recommend the adoption of the following resolutions:

Resolved, That Lewis McKenzie is not entitled to a seat in this house as a representative in the 38th Congress from the 7th congressional district in Virginia.

Resolved, That B. M. Kitchen is not entitled to a seat in this house as a representative in the 38th Congress from the 7th congressional district in Virginia.

The report of the committee was adopted without division April 16, 1864.

NOTE.—The debate occurs in vol. 51, page 1673.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

SLEEPER *vs.* RICE.

By the first returns the contestant was elected. An amended return was sent in by the ward officers seven days after the election. It was received by the governor and council, and the certificate was given to Mr. Rice.

The committee, holding that the State law fully justified the proceeding, declared in favor of the sitting member, and the House agreed to the report.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 17, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

The memorial, notice of contest, answer, testimony, documentary evidence, and all papers material to the case, are printed in Mis. Doc. No. 14. Mr. Sleeper has been heard by the committee in support of his claim, and Mr. Rice in reply. After a careful examination of the whole case, and consideration of all that has been submitted to them, the committee find the facts to be as follows: The third congressional district of Massachusetts consists of a portion (six wards) of the city of Boston, the city of Roxbury, and the town of Brookline. The election was held upon the fourth day of November, 1862, the day of the regular election for State officers. The result, as declared by the governor and council, the official canvassers, was as follows:

	Votes.
For Mr. Rice	5,045
For Mr. Sleeper	5,020
	25

Making a plurality of twenty-five votes for Mr. Rice.

Mr. Sleeper claims that the true result should be as follows:

	Votes.
For Mr. Sleeper	5,049
For Mr. Rice	5,017
	32

Making a plurality for Mr. Sleeper of thirty-two votes; and this is the contest. The notice of contest and answer are voluminous and somewhat complicated and involved. But the real contest covers but a single point and raises but a single question. Were the votes cast for representative in Congress, in ward 12 in the city of Boston, correctly counted or not? Mr. Sleeper claims that the true number of votes cast for representative in Congress, in ward 12, was as follows:

	Votes.
For Mr. Sleeper	890
For Mr. Rice	805
	85

Making a plurality for Mr. Sleeper in that ward of eighty-five votes.

Mr. Rice claims that the true vote in that ward was as follows:

	Votes
For Mr. Sleeper	861
For Mr. Rice	833
	28

Making a plurality in that ward for Mr. Sleeper of only twenty-eight votes. And as the claim of the one or the other of these gentlemen shall prove correct in this respect, it will result that Mr. Rice was elected by a plurality of twenty-five votes, or Mr. Sleeper by a plurality of thirty-two votes.

It is necessary to a correct understanding of the merits of this controversy that the method of conducting elections in Massachusetts be known. Polls are opened in cities in each ward, and the election is there conducted by a board of ward officers, consisting of a warden, clerk, and five inspectors. The voting is

by ballot, and every voter's name is found upon a check list. A part of these ward officers has charge of the ballot-boxes, and others the check list. When a voter approaches to vote, his name is first found and checked on the check list, and he then casts his ballot in the box. At the close of the poll, the result, after having been ascertained by the ward officers mentioned, is certified in blanks prepared for the purpose by a majority of those officers, publicly declared there before the adjournment in open meeting, entered upon the records of the board, and certified copies thereof delivered by him forthwith to the city clerk, who shall immediately enter them upon the city records. Certified copies of this record, after examination and other proceedings, which will be hereafter alluded to, and transmitted in the case of representative in Congress within ten days to the secretary of the commonwealth, and by him laid before the governor and council, who, as a board of canvassers, canvass the returns from the entire district, declare the result, and give a certificate of election to the person appearing to them to be elected. In the present case, the ward officers in ward 12, of the city of Boston, sent on the night of the election to the city clerk a certificate of the result, as follows:

CITY OF BOSTON.

At a legal meeting of the inhabitants of ward No. 12, in the city of Boston, in the county of Suffolk and Commonwealth of Massachusetts, qualified as the law directs, holden in said ward on Tuesday, the fourth day of November, in the year of our Lord one thousand eight hundred and sixty-two, for the purpose of giving in their votes for one able and discreet person, being an inhabitant of district No. 3, to represent said district in the next Congress of the United States, the whole number of votes given in as aforesaid were sorted, counted, recorded, and declaration thereof made, as by the constitution and law directed, and were for the following persons:

For Alexander H. Rice, of Boston, eight hundred and five (805) votes.

For John S. Sleeper, of Roxbury, eight hundred and ninety (890) votes.

In testimony whereof, the warden, inspectors of elections, and clerk of said ward, have hereunto set their hands, the fifth day of November, in the year of our Lord one thousand eight hundred and sixty-two.

HORATIO N. CRANE, *Warden.*
A. SMITH, JR., }
FRANCIS W. HILL, } *Inspectors.*
JOSEPH H. TOMBS, }
GEORGE W. BAIL, *Clerk.*

And the mayor and aldermen certified the result in the six wards of the city falling in this district, as follows:

No. 1.

COMMONWEALTH OF MASSACHUSETTS.

At a legal meeting of the inhabitants of the city of Boston, in the county of Suffolk and Commonwealth of Massachusetts, qualified by the constitution to vote for civil officers, holden in their several wards on the fourth day of November, being the Tuesday after the first Monday of said month, in the year of our Lord one thousand eight hundred and sixty-two, for the purpose of giving in their votes for a representative in the congressional district No. 3, of said Commonwealth, it appears from the several returns made to the board of aldermen, and by them examined according to law, that the whole number of votes given in were sorted, counted, recorded, and declaration thereof made, as by the constitution is directed, and were for the following persons:

John S. Sleeper, of Roxbury, three thousand six hundred and twenty-nine; Alexander H. Rice, of Boston, three thousand seven hundred and seventeen; Alexander H. Rice, of Roxbury, eight; Lysander Spooner, of Boston, one; —— Rice, one; William Whitney, one; Henry Crocker, one.

SAMUEL R. SPINNEY,
THOMAS P. RICH,
JOS. L. HENSHAW,
JAMES L. HANSON,
GEO. W. PARMENTER,
E. T. WILSON,
THOMAS C. AMORY, JR.,
OTIS NORCROSS,
Aldermen of the City of Boston.

Attest: SAMUEL F. McCLEARY,
City Clerk.

On the 11th day of November, seven days following, the ward officers of ward 12 made an amended or additional return to the mayor and aldermen, as follows:

A.

CITY OF BOSTON.

At a legal meeting of the inhabitants of ward No. 12, in the city of Boston, in the county of Suffolk and Commonwealth of Massachusetts, qualified as the law directs, holden in said ward on Tuesday, the fourth day of November, in the year of our Lord one thousand eight hundred and sixty-two, for the purpose of giving in their votes for one able and discreet person, being an inhabitant of district No. 3, to represent said district in the next Congress of the United States, the whole number of votes given in as aforesaid was sorted, counted, recorded, and declaration thereof made, as by the constitution and law is directed, and were for the following persons:

To Alexander H. Rice, as per corrected return, eight hundred and thirty-three (833) votes, instead of eight hundred and five, as per original return; and for John S. Sleeper, as per corrected return, eight hundred and sixty-one (861) votes, instead of eight hundred and ninety, as per original return.

HORATIO N. CRANE, *Warden.*
GEORGE W. BAIL, *Clerk.*

In testimony whereof, the warden, inspectors of elections, and clerk of said ward have hereunto set their hands the eleventh day of November, in the year of our Lord one thousand eight hundred and sixty-two.

HORATIO N. CRANE, *Warden.*
FRANCIS W. HILL,
ALFRED SMITH, JR.,
THOMAS JOHNSON,
JOSEPH H. TOMBS.
C. A. CONNOR, *Inspectors.*
GEORGE W. BAIL, *Clerk.*

SUFFOLK, *ss:*

CITY OF BOSTON, *November* 11, 1862.

Then personally appeared the within named persons, to wit, Horatio N. Crane, warden; Francis W. Hill, Alfred Smith, jr., Thomas Johnson, Joseph H. Tombs, and C. A. Connor, inspectors of elections, and George W. Bail, clerk, who solemnly swore that this corrected return signed by them is true.

Before me, HORACE SMITH, *Justice of the Peace.*

And the mayor and aldermen forthwith transmitted the same to the secretary of the Commonwealth, with the following certificate:

B.

Amended certificate.

COMMONWEALTH OF MASSACHUSETTS.

At a legal meeting of the inhabitants of the city of Boston, in the county of Suffolk, qualified as by the constitution required, to vote for representatives in the general court, holden on the Tuesday next after the first Monday in November, being the fourth day of said month, in the year one thousand eight hundred and sixty-two, for the purpose of giving in their votes for a representative of this Commonwealth, in the thirty-eighth Congress of the United States, for district No. 3, all the ballots given in therefor were sorted, counted, and recorded, and declaration thereof made, as by the constitution is directed, and were for the following persons, namely:

John S. Sleeper, of Roxbury, thirty-six hundred; Alexander H. Rice, of Boston, thirty-seven hundred and forty-five; Alexander H. Rice, of Roxbury, eight; Lysander Spooner, of Boston, one; —— Rice, one; William Whitney, one; Henry Crocker, one, if the amended return from ward 12, of which a copy is hereto attached, and marked A, should be received as a true return of the votes cast at said election.

THOMAS P. RICH,
Chairman of the Board.
JAMES L. HANSON,
JAMES L. HENSHAW,
C. A. RICHARDS,
OTIS NORCROSS,
THOMAS C. AMORY, JR.,
FRANCIS RICHARDS,
JOHN F. PRAY,
SAMUEL R. SPINNEY,
Aldermen of Boston.

Attest:

SAMUEL F. McCLEARY,
City Clerk.

NOVEMBER 12, 1862.

The governor and council received the amended return and gave the certificate as required by it to Mr. Rice. Upon the legality and truth of this amended return hangs this contest. In respect to it Mr. Sleeper claims, first, that it is illegal, because there is no law authorizing the ward officers to make an amended or additional return of this nature.

The law requires the result to be declared in open ward meeting, and this result never has been so declared, and cannot therefore be accepted as the result; and because the mayor and aldermen have never, as required by law, passed upon this amended or additional return, or determined anything one way or the other based upon it, but only transmitted the same to the governor and council, with a hypothetical certificate of their own, of no force in law; and, secondly, that the amended return is not true.

Although the last proposition of Mr. Sleeper is the most important of all, lying at the foundation of all investigations of the committee, who entertain no doubt that the seat should be awarded to that candidate for whom the greatest number of legal votes were cast, however officers may have conformed to or disregarded the requirements of law in Massachusetts in declaring, certifying, or canvassing the votes after they have been so cast, yet the committee, before proceeding to a discussion of the evidence bearing upon the question of how many votes were actually cast at that poll, embraced in the second proposition of Mr. Sleeper, stop for a moment to consider the soundness of his first proposition. Is there any law authorizing the ward officers to make an amended or additional return of the nature of the one here made? The duty of the ward officers, as well as of the mayor and aldermen in the premises, is prescribed in chapter 7, section 16, of the General Statutes of Massachusetts, in these words:

The mayor and aldermen and the clerk of each city shall forthwith, after an election, examine the returns made by the returning officers of each ward in such city, and if any error appears therein, they shall forthwith notify said ward officers thereof, who shall forthwith make a new and additional return, under oath, *in conformity to truth*, which additional return, whether made upon notice or by such officers without notice, shall be received by the mayor and aldermen or city clerk at any time before the expiration of the day preceding that on which by law they are required to make their returns, or to declare the result of the election in said city; and all original and additional returns so made shall be examined by the mayor and aldermen, and made part of their returns of the results of such election. *In counting the votes in an election no returns shall be rejected when the votes given for each candidate can be ascertained.*

In this clear and comprehensive section is comprised the whole law of Massachusetts upon the subject. By it a new or amended return is not only authorized, but required in certain cases—its language being: "Who *shall* forthwith make a new and additional return." Of course the new return is to be different from the one already made, or it would be useless. It *must*, therefore, be different from the original declared result, for that is what the law requires, and is in the first return, excepting always the possible case of a clerical mistake in transcribing a declared result into a certificate, which cannot embrace the whole scope of the section. This disposes of the objection that the result included in the second return has never been declared in open ward meeting, for if it had been so declared there would have been no occasion, except in the one improbable case stated, for a new return. The last clause in the statute renders immaterial also any defects of form in the first return, holding it sufficient when the true number of votes can be ascertained from it, and consequently requiring a new return only when the true number of votes had not been declared and certified already.

The committee have not overlooked the importance which the law of Massachusetts attaches to a "result declared in open town meeting." It is wisely deemed a great safeguard against subsequent tampering with a count of votes or with the ballots themselves in a closely contested election, and should not be set aside except on controlling evidence. While no person should be deprived of an office awarded him by a result so declared in open town meeting at the

close of the polls on any doubtful or suspicious testimony, it is no less important that he for whom a majority of the votes has been actually cast should not be deprived of the seat by any mistake in counting those votes, however made, simply because that mistaken count has been announced as the true result in open meeting. Massachusetts does not herself treat this "declared result" as conclusive, but provides for a new or additional return conformable to nothing but "the truth," and the committee see no reason for giving it greater sanction than *prima facie* evidence of what the truth is, controllable, but not to be controlled, except upon evidence which leaves no room for reasonable doubt.

But two restrictions are placed upon the additional or amended return by the statute. The first is that it be made to the city clerk or mayor and aldermen before the expiration of the ninth day after the election. This was so made on the seventh day. The second restriction or limitation is that it be made "in conformity to truth;" and it is to be made under the oath of the ward officers; it must, therefore, be in conformity to what they believe to be the truth. The statute requires the mayor and aldermen to *examine* the returns, and if any error appears therein, to notify the ward officers thereof, who shall thereupon "make a new and additional return." But the statute does not require the ward officers to wait till the error has been discovered by the mayor and aldermen and been notified to them before they can make their new return, for it expressly declares that a new return made "in conformity to truth" by the ward officers, "whether made upon notice or by such officers without notice, shall be received by the mayor and aldermen." Now, a new return made without notice of the error from the mayor and aldermen, in order to "be in conformity to truth," and be sworn to by them, must be the result of an examination on their part to ascertain what the truth is to which they are to make oath. The statute does not limit or prescribe what shall be that examination, and therefore any such which will lead to the "truth," to which their new return must conform, is legitimate and proper. The claim of Mr. Sleeper, that because the law does not *expressly* provide for the preservation and recount of the ballots, it does not authorize it, is just as valid against any other method of examination for ascertaining what that "truth" is to which the ward officers are required to make their new return conform, and, if sound, prevents all *examination* which the law does require. The objection of Mr. Sleeper that the mayor and aldermen have never passed upon the sufficiency of this new return is founded in a mistake of the law. The section already quoted requires the mayor and aldermen not to adjudicate and determine upon the sufficiency of this new return, but to examine and make it a part of their return. They *return* to the secretary of the Commonwealth, and he lays this new with all previous returns before the governor and council, who are to canvass the whole vote of the district and award the certificate to the person who appears to them to be elected.

The committee are therefore of opinion that the statutes of Massachusetts contain ample provision for the proceedings of the ward officers and mayor and aldermen of Boston, in respect to this new or amended return.

The more important consideration remains yet to be disposed of. Did this new return "conform to the truth?" What was the actual vote cast in ward 12 for representative in Congress? Upon this question the committee have bestowed much care and reflection, and they find, in respect to it, the following facts: This was an election for State officers, as well as for representative in Congress, and the voting was by ballot, and the names of candidates for all the offices, seventeen in number, were upon one ballot. It is proper to state that, though there were but two parties in that election, there was a variety of tickets in style and name—all, however, on their face bearing the names of the set of candidates for those seventeen offices, which the political friends of Mr. Rice on the one hand, and of Mr. Sleeper on the other, had presented for support, excepting a ticket which bore the party names of Mr. Sleeper's political friends

for all the offices but that of representative in Congress, for which the name of Mr. Rice was substituted for that of Mr. Sleeper. This ticket appears to have been cast by a portion of the voters, who, while voting otherwise with Mr. Sleeper's friends, preferred to vote for Mr. Rice for representative in Congress. The original ballots were before the committee, and this ballot does not appear to have simulated any other, but to have been easily distinguishable from all the rest. One of them is reprinted in Mis. Doc. No. 14, page 71, and it is in respect to these ballots that whatever mistake existed arose. The ward officers, seven in number, were divided politically, four voting for Mr. Rice, including the clerk of the ward, and three for Mr. Sleeper, including the warden, the principal ward officer. These ward officers occupied a position in the ward-room, where the votes were cast, separated from the voters by a railing, and upon a raised platform. As has already been described, a part of the ward officers had charge of the check list and others the ballot-boxes. The ballots were counted from time to time during the day as they accumulated in the boxes, by the warden and clerk—the one a political friend of Mr. Sleeper, the other of Mr. Rice—at a table in the rear of the voting, and the result for governor and representative in Congress, each hour, was stated by the clerk upon a black-board in the ward-room, for the information of all who cared to know of the progress of the election. In counting, the tickets were first assorted by the warden and clerk in small packages of different sizes—the straight tickets by themselves, and the split or scratched tickets by themselves. As they were counted after being thus assorted, the number for the respective candidates for governor and representative in Congress was put down against the name of each candidate on a half sheet of paper, which was styled "rough count throughout the day." This identical paper was before the committee, and a *fac simile* of it is annexed to this report, marked I. Photographic copies of it were also furnished the committee, which they still have. From this paper I the hourly results were placed upon the black-board. When the packages of votes thus assorted were counted and put upon the rough count I, they were tied up separately, with a string, and each package of straight tickets marked in pencil, "all clean," or "all clear," with the number of ballots and the word "taken" upon them, with the initials of the person so counting them. The split or scratched tickets were also tied up and marked like the others, except for the words "all clean" or "all clear" was a mark denoting that they were not straight tickets; and they had also the names which had been scratched written on the back, with the number it contained for him put down against it. These packages thus tied up and marked were then recounted and the results for each candidate placed upon another paper. That paper also was before the committee, and a *fac simile* accompanies this report, marked K. Photographic copies of this paper also are with the committee. The hourly announcement upon the black-board was taken from the "rough count," paper I, while the final result, as announced in open ward meeting and certified in the first return to the mayor and aldermen, was taken from paper K. At the close of the meeting the clerk of the ward took the several packages of votes heretofore described, put them into one bundle, tied a string around the middle of the bundle, and a paper around the ends of the package, and took it home with him and deposited it in a trunk in a closet, in the attic of his house, where they remained untouched, as far as is known, until the Sunday following.

A recurrence to papers I and K will show that the aggregate vote for governor in the ward was 1,702; for councillor, 1,695; and for senator, 1,692; while the vote on paper I, for representative in Congress, was only 1,633, 69 votes less than the aggregate for governor, 62 votes less than that for councillor, and 59 votes less than that for senator; that while the aggregate vote for governor, councillor, and senator varied from each other only ten votes from highest to lowest, that for representative fell some sixty votes below them all—sixty-

nine below the highest, and fifty-nine below the lowest. It will also be observed that while the count upon I and K for representative in Congress, if correct, should agree with each other, they disagree both as to the number of votes given each candidate, and also as to the aggregate of the votes for both. Mr. Rice has on paper I 770 votes; on paper K he has 805. Mr. Sleeper has on paper I 863 votes, and on paper K 890 votes. The aggregate of their votes on paper I is 1,633; on paper K it is 1,695.

The difference of sixty votes between the aggregate of votes for representative to Congress, as announced on the blackboard in the ward-room, and that for governor and other officers, attracted attention, and was the occasion of remark to the clerk and other ward officers generally during the week. And the question was frequently put to them: Were these sixty men in the ward who, while voting for all other officers, had failed altogether to vote for representative in Congress, and that, too, when the principal interest centred on congressman and governor? No ward officer had seen deposited or in the count any such votes. Under this inquiry the clerk of the ward took, in his own house, by himself, papers I and K to recast the figures and verify them. He testified that such had been his custom at former elections. By turning to paper I, it will be observed that the figures were made upon it in the following manner: The number of votes for Mr. Rice in the first package counted were 5, and they are put down against his name. In the next package there were 9 for Mr. Rice, and the 9 is placed over the 5, and the sum 14 carried to the right. In the next package there were 60 for Mr. Rice, and the 60 is placed over the 14, and the sum 74 is again carried to the right, and so on to the end. In the second line of figures, fourth from the left, it will be observed that the aggregate had then come to be "569;" three were placed over those figures, making "572;" 1 was placed over that sum, making 573; 5 were placed over those figures, and the sum carried forward should have been 578; instead, however, it was put down "518," a mistake of 60 votes, and this mistake runs through to the end. An examination of the manner in which the figures 573 were made, as appears on the original paper, which was before the committee, and on the *fac simile* appended to this report, will show how easily the 7 joined at the top to the 5 might be mistaken for a 1. Correcting this mistake, which is perfectly clear, and restoring to Mr. Rice the 60 votes here lost to him, his vote would be by the "rough count," corrected, 830 votes, which, with the 863 votes given Mr. Sleeper by the "rough count," would make an aggregate of 1,693, one more than the lowest, and nine less than the highest aggregate given among all the candidates for the other offices. But this does not agree with paper K, which was declared to be the vote on election day, and certified as such to the mayor and aldermen, for, adding this corrected vote for Mr. Rice, 830, to that put down on paper K for Mr. Sleeper, 890, and it makes an aggregate of 1,720, thirty-two votes more than the lowest, and twenty-two votes more than the highest of the other aggregates. On discovering this surplus thus produced, the ward clerk conferred with the former clerk of the ward and other friends, and then returned and examined by himself alone, and unbeknown to any one else, the bundle of votes in his attic. Taking off the paper wrapper, but without untying the string around the middle of the bundle of packages, or removing the packages, he examined the votes in each package, took off the number of votes for representative in Congress on each of the packages, and then restored them to their former place in the closet. In consequence of the conviction that an error had been committed in counting, which this examination produced on his mind, he then procured a meeting of all the ward officers at his house on the following evening, when the votes were by them there recounted with great care, and the result as thus ascertained was embodied in the new or amended return, signed by all the ward officers, seven in number, four of them voting themselves for Mr. Rice, and three of them for Mr. Sleeper, sworn to by them all, forwarded to the mayor and

aldermen, and by them transmitted to the governor and council within the time prescribed by law. In counting the votes at this time, the ward officers took each of the small packages upon which the number of votes was marked, recounted it carefully, and checked the corresponding numbers upon paper K.

It will be observed that on paper K there are, among the several packages set down to Mr. Sleeper, three packages of twenty-eight votes each, and none of that number for Mr. Rice. In the recount, after all the votes in the whole bundle for Mr. Sleeper were counted and checked, there had been checked but two packages of twenty-eight votes, and there remained unchecked, to any one, a package of twenty-eight votes, like the one on page 71, Miscellaneous Document, being a "people's ticket," or that of Mr. Sleeper's political friends, with the name of Mr. Rice printed in place of Mr. Sleeper's for representative in Congress. This package of votes was marked on the outside, "twenty-eight votes, all alike, taken.—G. W. B.," (G. W. Bail, clerk of the ward.) This mark had been evidently mistaken for "all clean" tickets—that is, tickets with Mr. Sleeper's name for Congress upon it with his political associates, and these tickets had been counted for Mr. Sleeper, when they should have been counted for Mr. Rice. Restoring these twenty-eight votes to the count for Mr. Rice, and taking them from that for Mr. Sleeper, with the adjusting in the same way of two or three votes counted for Mr. Rice when they should have been counted for Mr. Sleeper, and as many more which had been counted for Mr. Sleeper when they should have been counted for Mr. Rice, about balancing each other, (see Miscellaneous Document, page 32,) the result was given which is contained in the amended return, signed and sworn to by all the ward officers, viz: for Mr. Rice 833 votes, instead of 805; and for Mr. Sleeper 861 votes, instead of 890; making a majority for Mr. Rice in the district of twenty-five votes. That this was the correct count of the ballots on the second count the Monday night after the election, no one disputes, and an examination of the evidence, with a sworn return of the seven ward officers, does not leave room for doubt. If, therefore, the ballots had not in the mean time been tampered with, the proof could not be made stronger that the true result had been reached. Upon this point there is not the slightest evidence calculated to awaken suspicion. The clerk of the ward, whose testimony is uncontradicted, and whose character appeared to be above reproach, testifies positively that the bundle recounted on Monday night contained all the votes cast on the day of election, and none others, in precisely the same condition as when tied up at the close of the polls; that he took them that night home with him, and put them in a trunk in a closet in his attic; that the trunk shut with a spring lock, the key remaining in the lock; that no person, to his knowledge, knew they were there but himself; that his own family consisted of a wife, confined all this time to her bed with sickness, an infant child, a nurse, an aunt visiting the family, and himself. He also testifies that the mark "28 votes, all alike, taken.—G. W. B." written upon the package having Mr. Rice's name in the place of Mr. Sleeper's was written on the back of the ballots by himself on election day, and that the mistake must have arisen in calling off the packages. There is, however, corroborative proof found in the papers I and K themselves. By correcting the sixty votes in paper I, as before stated, and restoring to Mr. Rice the twenty-eight votes here spoken of, the aggregate vote for representative to Congress corresponds with those cast for the other officers, as follows: for governor, 1,702; for representative in Congress, 1,693; for councillor, 1,695; and for senator, 1,692. Correcting paper I, and the aggregate on paper I will be 1,694; but if that correction be applied to paper K, without also counting the twenty-eight votes, an aggregate of 1,720 votes will be produced, just twenty-eight votes more than the aggregate given for senator, and twenty-seven more than that given for councillor. The supposition, therefore, that the ballots had been tampered with before the last count, in order to produce this result, involves not

only the perjury of the clerk of the ward, but also requires that papers I and K be both forged and put in their present condition for the same purpose. But the evidence was abundant from all sides that the hourly announcements, put upon the blackboard in the ward-room on election day, corresponded with paper I, and disclosed the precise discrepancy in the aggregate vote found on that paper; and the first return made on the night of the election was made from paper K, and corresponded with it. Besides all this, the very sight of the original papers, now with the committee, shows how preposterous is the pretence that they have been altered to produce this result. Without the correction in paper I, we must suppose that there were sixty ballots cast with no name upon them for representative in Congress, yet no such ballot has been produced, and no person who cast such a ballot; and with that correction, but without the correction in paper K, we must conclude that twenty men voted for Mr. Sleeper for Congress, but for no one else of the candidates for the sixteen other offices voted for on the same ballot by all others; yet no such ballot has ever been seen, and no such voter has ever been found. By making the correction in both papers a striking coincidence will be found, not only between the votes for candidates for Congress, but even the aggregate thus produced and the aggregates for other offices. Restoring the sixty votes to Mr. Rice on paper I, and counting for him, instead of for Mr. Sleeper, on paper K, the twenty-eight votes for him found on the "people's ticket," and then Mr. Rice will have on paper I 830 votes, on paper K 833 votes. Mr. Sleeper will have on paper I 863 votes, and on paper K 862 votes. The aggregate of vote for Mr. Rice and Mr. Sleeper on paper I would then be 1,693, on paper K 1,695. The aggregate for other officers has been already shown to be, for senator, 1,692; for councillor, 1,695; and for governor, 1,702. The committee will only add a statement by the warden who presided at this election, and who himself voted for Mr. Sleeper, published in the public papers a few days after he had recounted these votes. He says:

SOUTH BOSTON, *November* 12, 1862.

In conclusion, there was, and is, to my mind—and all of the inspectors concur with me in this result—an unfortunate, unintentional error on the part of our clerk, in originally giving to Mr. Sleeper these twenty-eight votes, when he should have put them to the credit of Mr. Rice.

HORATIO N. CRANE,
Warden of Ward Twelve.

The committee, in the absence of a particle of testimony calculated to cast suspicion upon the fairness and truth of this recount, or to control the position and corroborated testimony in its support, are of opinion that the certificate of election was rightly awarded to Mr. Rice, and that he is entitled to the seat. They thereupon recommend the adoption of the following resolutions:

Resolved, That John S. Sleeper is not entitled to a seat in this house as a representative in the 38th Congress from the third congressional district in Massachusetts.

Resolved, That Alexander H. Rice is entitled to a seat in this house as a representative in the 38th Congress from the third congressional district in Massachusetts.

The report was adopted, March 4, 1864, without debate or division.

NOTE.—See vol. 50, page 942.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

GALLEGOS *vs.* PEREA, *of New Mexico.*

The contestant asked for an extension of time for taking testimony, he having neglected to comply with the provisions of the law. The House refused.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 6, 1864.

Mr. SMITHERS, from the Committee of Elections, made the following report:

That an election was held in said Territory on the first Monday of September, 1863, for delegate in Congress. That at this election the contestant and sitting delegate were the only candidates, and Francisco Perea appearing to have received a majority of votes, received the certificate of election.

The contestant thereupon served notice of his intention to contest, alleging divers matters of law and fact, and also gave notice that he would take the testimony of witnesses before Hon. Kirby Benedict, chief justice of the supreme court of New Mexico, or, in the event of his absence, before Miguel E. Pino, probate judge of the county of Santa Fé.

To this notice of contest the sitting delegate replied, and after notice to that effect proceeded to take testimony. The contestant omitted to take any evidence in support of his allegations, but in lieu thereof presented his petition to the House praying to be allowed further time to examine witnesses. The reasons assigned in support of this petition are that there are but two judges of the district court in New Mexico; that one of them, Joseph G. Knapp, resides in the southern part of the Territory, at a considerable distance from the contestant, the road thither being rendered dangerous by hostile Indians, and the other, Kirby Benedict, the chief justice before whom notice was given to take testimony, is a violent political opponent. No reason is alleged why the evidence could not have been taken before the probate judge named in the notice.

The contestant has failed to appear before the committee either in person or by attorney, and they are ignorant of the facts except as stated in the petition. Under these circumstances the committee see no reason for granting any extension of time as prayed.

The committee, however, would suggest that in case the House shall determine to extend the time in favor of the contestant, further time be also allowed to the sitting delegate, the testimony taken by him being informal.

The committee therefore recommend the adoption of the following resolutions:

Resolved, That the petition of José M. Gallegos asking further time to take testimony in the matter of his contest of the right of Francisco Perea to a seat in this house as delegate from New Mexico be not granted.

Resolved, That the Committee of Elections be discharged from any further consideration of the memorial of contestant.

The House agreed to the report without debate or division, April 6, 1864.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

BRUCE *vs.* LOAN, *of Missouri.*

The grounds of the contest in this case were, interference with the election by the armed militia of the State and improper conduct of the officers of the election at certain polls. The committee held that there was such an amount of intimidation by armed men at the polls, and such a condition of things existing in Missouri, as to require the seat to be vacated. The House refused to adopt the report, and the sitting member retained the seat. The case was particularly important, as there were two others from the same State—Price *vs.* McClurg and Birch *vs.* King—in which the same principles were involved. After the House had decided this case, the others were abandoned by the committee.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 8, 1864.

Mr. GANSON, from the Committee of Elections, made the following report:

That an election was held in the State of Missouri on the fourth day of November, 1862, for representatives in the thirty-eighth Congress and for

State and local officers. This was the first election attempted to be held in the State since the commencement of the rebellion. The administration of the affairs of the State had been conducted by a provisional government since the fore part of August, 1861.

A convention of the State was in session in the spring and summer of 1862. On the 10th of June, 1862, an ordinance defining the qualifications of voters and civil officers in the State was adopted by the convention providing, among other things, as follows:

AN ORDINANCE defining the qualifications of voters and civil officers in this State.

Be it ordained by the people of the State of Missouri in convention assembled as follows:

SECTION 1. No person shall vote at any election to be hereafter held in this State under or in pursuance of the constitution and laws thereof, whether State, county, township, or municipal, who shall not, in addition to possessing the qualifications already prescribed for electors, previously take an oath in form as follows, namely:

"I, ——— ———, do solemnly swear (or affirm, as the case may be) that I will support, protect, and defend the Constitution of the United States and the constitution of the State of Missouri against all enemies and opposers, whether domestic or foreign; that I will bear true faith, loyalty, and allegiance to the United States, and will not, directly or indirectly, give aid and comfort or countenance to the enemies or opposers thereof, or of the provisional government of the State of Missouri, any ordinance, law, or resolution of any State convention or legislature, or any order or organization, secret or otherwise, to the contrary notwithstanding; and that I do this with a full and honest determination, pledge, and purpose, faithfully to keep and perform the same, without any mental reservation or evasion whatever. And I do further solemnly swear (or affirm) that I have not, since the 17th day of December, A. D. 1861, wilfully taken up arms or levied war against the United States, or against the provisional government of the State of Missouri: So help me God."

SEC. 2. Before any person shall be elected or appointed to any civil office within this State under the constitution and the laws thereof, whether State, county, township, municipal, or other civil office, he shall take and subscribe an oath in form as follows:

"I, A B, do on oath (or affirmation) declare that I have not, during the present rebellion, wilfully taken up arms or levied war against the United States, nor against the provisional government of the State of Missouri, nor have wilfully adhered to the enemies of either, whether domestic or foreign, by giving them aid and comfort, but have always, in good faith, opposed the same. And, further, that I will support, protect, and defend the Constitution of the United States and of the State of Missouri against all enemies and opposers, whether domestic or foreign, any ordinance, law, or resolution of any State convention or legislature, or of any order or organization, secret or otherwise, to the contrary notwithstanding; and that I do this with an honest purpose, pledge, and determination faithfully to perform the same, without any mental reservation or evasion whatever;" which oath shall be filed in the office of the secretary of state by all candidates for State offices, and by candidates for all county and other offices in the office of the clerk of the county court, (or other officer charged with equivalent duties,) in the counties wherein they respectively reside, at least five days before the day of election. And no vote shall be cast up for, or certificate of election granted to, any candidate who fails to file such oath as required by this ordinance.

SEC. 3. Any person who shall falsely take, or having taken, shall thereupon wilfully violate any oath prescribed by this ordinance, shall, upon conviction thereof by any court of competent jurisdiction, be adjudged guilty of the crime of perjury, and shall be punished therefor in accordance with existing laws.

And it shall be the duty of the judges of all courts having criminal jurisdiction under the laws of this State especially to charge the grand juries in the counties in which such courts shall be held, respectively, and of all grand juries, in the performance of their duties under the laws of this State, especially to inquire concerning the commission of any act of perjury mentioned or made punishable by this or any other ordinance adopted by this convention.

SEC. 5. That judges and clerks of all elections held under the laws of this State shall, in addition to taking the oath required by existing laws, take the further oath that they will not record, nor permit to be recorded, the name of any voter who has not first taken the oath required to be taken by the first section of this ordinance.

SEC. 6. The general assembly of this State may, at any time, repeal this ordinance, or any part thereof.

AIKMAN WELCH,
Vice-President of Convention.

(Pages 57, 58, 59.)

Adopted June 10, A. D. 1862.

SAMUEL A. LOW, *Secretary of Convention.*

The constitution of the State of Missouri, at the time the foregoing ordinance was adopted, by the 10th section of article three, fixed the qualification of voters as follows:

SEC. 10. Every free white male citizen of the United States, who may have attained to the age of twenty-one years, and who shall have resided in this State one year before an election, the last three months whereof shall have been in the county or district in which he offers to vote, shall be deemed a qualified elector of all elective officers. (Page 141.)

The civil commotion in Missouri, occasioned by the rebellion, had produced so much contention between those who differed as to some of the questions involved in a proposed change of the organic law of the State, and in the policy of the federal government relative to the subject of emancipation, that those in authority in the State apprehended there might be serious disturbance in some of the precincts on the day of election. This apprehension was so fully and firmly entertained, that the adjutant general of the State, on the 23d of October, issued an order, designated as Order No. 45, of which the following is a copy:

General Orders, No. 45.

HEADQUARTERS, STATE OF MISSOURI,
Adjutant General's Office, St. Louis, October 23, 1862.

I. A general election is to take place throughout the State the first Tuesday in November next.

This is the first attempt of the people to choose their officers since the war of the rebellion commenced. It will be an occasion when *angry passion*, excited by the war, might produce strife, and prevent the full expression of the popular will in the selection of officers.

The convention has provided, by ordinance, that every voter shall, before voting, take a prescribed oath, and that no vote shall be counted in favor of any candidate for a State or county office unless he shall have taken an oath prescribed for candidates. The ordinance of the convention fixes heavy penalties upon those who take the oath falsely.

These are the safeguards which the convention judged necessary to keep unfaithful and disloyal persons from exercising power in the State. *They are sufficient.* No person must be allowed to interfere with the freedom of those qualified to vote under this ordinance.

The enrolled militia, being citizens of the State, and very nearly all entitled by age to vote, will doubtless be generally at places of voting.

They are a body organized for the purpose of preventing violations of the law of the State, and they all know that it is essential to the maintenance of our government that all qualified voters should be allowed, without molestation of any kind, to cast their votes as they please.

II. It is required of all officers and men of the enrolled militia that they keep perfect order at the polls on the day of election, and that they see that no person is either kept from the polls by intimidation, or in any way interfered with in voting at the polls for whatever candidate he may choose.

III. If any officer or private shall either interfere with the rights of voters, or countenance such interference by others, it will be treated as a high military offence, and punished with the utmost rigor.

IV. Whenever there is any reason to apprehend any interference with the election on the part of bands of guerillas, the commanding officer of the nearest regiment will detail a sufficient force to prevent any such interference, and station it where there is any apprehended danger.

V. In case of disturbance arising which cannot be arrested by the civil authorities, any commissioned officer present is hereby ordered, *at the request of any judge, sheriff, or justice of the peace*, to use the necessary military force to suppress it.

VI. Commanding officers of the enrolled Missouri militia are hereby directed to see that the foregoing orders are strictly obeyed.

By order of the commander-in-chief.

WILLIAM D. WOOD,
Acting Adjutant General, Missouri.

Official:

JOHN B. GRAY,
Adjutant General.

On the first of November, 1862, another general order was issued from the headquarters of the seventh military district, which embraced the seventh congressional district, calling the attention of the officers and soldiers of the militia in that district to the provisions of General Order No. 45, and warning such *officers and soldiers* against interfering with the freedom of the election.

The order is as follows:

IMPORTANT GENERAL ORDER.—QUALIFICATION OF VOTERS.

General Order, No. 33. } HEADQUARTERS 7TH MILITARY DISTRICT, *St. Joseph, Missouri, November* 1, 1862.

The attention of all officers and soldiers of the militia of this district is called to General Order No. 45, dated "Headquarters, State of Missouri, adjutant general's office, St. Louis, October 23, 1862," with reference to the election on Tuesday next. The military should bear in mind that they are not the judges of the qualifications of voters. That duty is devolved by law on the judges of the election. If these officers either admit improper persons to vote, or exclude proper persons from voting, the statutes of this State provide an ample remedy. The militia will carefully abstain from all acts calculated to interfere with the freedom of election. All officers who interfere with the rights of voters will be reported to the commander-in-chief, to be dealt with as he may decide. All soldiers guilty of the same offence will be punished as a court-martial shall determine.

By order of Brigadier General Willard P. Hall:

ELWOOD KIRBY,
Assistant Adjutant General.

(Page 141.)

There were unquestionably sufficient indications, prior to the election, of an intended interference with the electors at the polls, to induce the authorities of the State to issue the foregoing orders. The occurrences on election day show very plainly that the apprehended interference was from the militia itself. This accounts for the peculiar phraseology of Order No. 33.

The section of the constitution above cited, and the provisions of the ordinance of June 10, 1862, clearly determined the qualifications of the voters, and every person who possessed such qualifications was, as the military authorities instructed the officers and soldiers of the militia, entitled to vote without any molestation.

The contestant, Mr. Bruce, insists that the election was neither full, fair, nor free. He claims that many qualified voters were forcibly prevented from voting; others were so much intimidated by the force used, and by the threats made on and prior to the day of the election, that they refrained from attending the polls; and in numerous instances persons refrained from voting after they reached the place of holding the elections from well-grounded apprehension of personal injury. He claims also that, in some cases, the polls were forcibly closed and poll-books were destroyed. The interference complained of came chiefly from a portion of the armed and unarmed militia of the State.

The contestee, on the hearing, took exceptions to some of the allegations contained in the contestant's notice, as indefinite, and referred to failures on the part of the contestant to comply with some of the provisions of the act passed in 1851, relative to taking testimony in contested election cases.

The majority of the committee, from the view they entertain of this case, deem it unnecessary to discuss, in their report, the questions presented by the contestee's exceptions, as they are entirely satisfied from the testimony produced, where both parties appeared and the witnesses were subjected to a rigid cross-examination by the contestee, that the election was not conducted so as to entitle either candidate to a seat in this house.

The seventh congressional district of Missouri is composed of the counties of Buchanan, Andrew, Holt, Atchison, Nodaway, Worth, Gentry, Harrison, Mercer, Grundy, Putnam, Sullivan, Livingston, Daviess, and De Kalb.

Evidence was produced before the committee relative to interference with voters in the counties of Buchanan, Andrew, Atchison, De Kalb, and Livingston. It was conceded that the election was fairly conducted in the counties of Worth, Gentry, Harrison, Mercer, Grundy, Putnam, Sullivan, and Daviess.

It was claimed by the contestant that there was improper interference with the voters in the counties of Holt and Nodaway. Testimony to show such interference in those counties was not taken by the contestant, although he served notices to take testimony there, for the reason, as alleged by him, that he could

not procure persons to examine witnesses in those counties. Sworn statements were produced, and evidence given, strongly tending to show that it would not have been prudent for the contestant, or any one representing him, to go into those counties to examine witnesses in this case. On this subject Washington Jones swears as follows:

Statement of Washington Jones, attorney.

I was employed as attorney by John P. Bruce to attend to the taking of depositions at Maryville, in Nodaway county, Missouri, on the 2d, 3d, 4th, and 5th days of November, 1863, in pursuance of a notice to that effect, which was handed me at the time, and which is now before me, together with other papers in the case. I was in Maryville on the days appointed for the taking of the depositions; saw the judge before whom they were to be taken, and some of the witnesses mentioned in the notice; but became satisfied, from what I saw and heard, that no depositions on behalf of Bruce could be taken at the time and place appointed for the purpose: and such was the opinion of all with whom I conversed on the subject. There was a high state of excitement in the town at the time, owing, I think, partly to the fact of the election coming off on the 3d, and partly to other circumstances. What is now known as the radical party seemed to have the entire control of everything of a political character, and it was stated to me that persons belonging to that party, and who were political enemies of Major Bruce, had said that no depositions in his behalf should ever be taken in Maryville. These statements, together with the general feeling manifest at the time, satisfied me, as also, I believe, Judge Ellis, that it would not be safe for him, or any other parties connected with the matter, to attempt to take the depositions, or even to let it be known that such a thing was in contemplation.

I was prepared to attend to the taking of the depositions, and I think the testimony of several witnesses might have been obtained, but for the facts stated above. As an evidence of the feeling which prevailed at the time, I will state that I heard several persons say, on the day of the election, that they would like to vote for the conservative ticket, but did not think it safe for them to do so.

WASHINGTON JONES.

Subscribed and sworn to before me this 14th day of November, 1863, as witness my hand and notarial seal.

[SEAL.]

JOHN WILLIAMS, *Notary Public.*

HOLT COUNTY, *Oregon*, *Missouri*, *October* 9, 1863.

DEAR SIR: Your letter is now before me, and the contents noted.

I would say to you that Judge R. H. Russell has been ordered to leave in ten days, and I do not believe he will act in your case; and from the condition matters are in here, I do not believe it would be advisable for you to come up here, and I know it would not do for me to have anything to do in the matter.

Yours truly,

R. WILSON.

JOHN P. BRUCE.

(Page 122.)

As has been before stated, and as will appear from the evidence hereinafter referred to, the interference complained of in this case came chiefly from a portion of the armed and unarmed militia. The contestee was at the time of the election a brigadier general, and had shortly before the election ceased to be in command of the militia in the seventh congressional district, although he still held such official position elsewhere. Many of the candidates for State offices, associated with him on the ticket, were militia officers then in command. For instance, Colonel John Severance, of the enrolled militia, was running for State senator; Captain James Brierly, of the enrolled militia, and Major John L. Bittinger, aid to General Hall, were running for the State legislature; Captain George Lyon, of the enrolled militia, was candidate for county treasurer. All of these persons were candidates in Buchanan county.

Again: in Andrew county, besides the contestee, the following officers of the enrolled militia were candidates, and associated with him in the election: Colonel William Heren, of the enrolled militia, was a candidate for the State senate; Major John McLain, of the enrolled militia, was a candidate for county court justice; Lieutenants Phineas Edwards and Ralph T. Wilson, of the enrolled militia, were candidates for county clerk.

Again: in Atchison county, Colonel Heren was candidate for the State senate; Colonel Pike, then captain of the enrolled militia, was candidate for representative; A. E. Wyatt, captain of the enrolled militia, ran for the office of sheriff; and A. B. Durfee, who was candidate for the office of county treasurer, was understood to hold some office connected with the enrolled militia.

De Kalb county was in the senatorial district of Colonel Severance.

Colonel Heren, of the enrolled militia, was colonel of the regiment organized from the counties of Andrew, Holt, Atchison, and Nodaway, which comprised the senatorial district in which he was the senatorial candidate.

Colonel Severance, of the enrolled militia, was colonel of the regiment made up from the counties of Buchanan and DeKalb, which are a portion of the senatorial district in which he was the senatorial candidate.

Neither the contestant nor any persons associated with him, as candidates in the election, were connected officially with the enrolled militia of the State, and there was not any evidence before the committee tending to show that he or his friends in any instance interfered, or attempted to interfere, with the freedom of the election. Whatever interference there was, so far as the evidence shows, came solely from the enrolled militia and from those professing to be friends of the contestee. Reference will now be made to some of the evidence to show the character and extent of that interference.

INTERFERENCE IN BUCHANAN COUNTY.

Samuel Ensworth, the sheriff of Buchanan county, who swore that he was a friend of the contestee, and had intended to vote for him, testified as follows:

I was sheriff of the county of Buchanan, Missouri, and was at three different precincts of voting. I was two or three times at the Allen Hotel. The votes were taken in a room with two doors, and the members of the militia guarded each door with bayonets crossed; and to get the privilege to go to the polls I had to ask the permission of the judges, although it was my duty to attend at the election and superintend the same. I did not then see any other interference. I was at the polls at the market-house, which was after the disturbance commenced. I started up the stairs. At the head of the stairs was person in the uniform of the militia. The old man Langston came up the opposite stairs. Langston had a ticket in his hand, and the person in uniform asked him to see his ticket. Langston handed him his ticket; he took the ticket and tore it up, and drove Langston down. There was considerable commotion around the market-house. I went into the room where votes were taken, and the place of voting was surrounded by a crowd of excited persons, and some seemed afraid to present their votes, and so stated to me; but persons who favored the election of the nominees had no fears, nor seemed to dread any danger from offering to vote. In the excited crowd, and those that intimidated the persons from voting, were Union-clothed soldiers. I was not at the court-house until after the voting there was discontinued. But when I was at the court-house the place seemed to be under the control of a set of persons who belonged to the militia, with their arms.

About 9 or 10 o'clock in the morning I saw one of those militia have a young man who was reading in my office in custody, marching him off to the guard-house. I wanted to know the reason of his arrest. He said he was ordered to arrest all persons who voted, if they had been enrolled under order 24. I went to the place where he was put under guard; there I saw the officer of the day. He said he was ordered by Colonel Severance to have all such persons arrested. While I was there the orders came and ordered the release of the prisoners, which was done. After dinner, and visiting the precincts at the court-house and market-house, I came to the conclusion that there could not be any full, fair, or free expression of opinion at the polls, and did not look after the election, and did not vote, and advised others that it was useless to vote. * * * * * * *

I think there were at least one thousand votes that were not taken on account of improper influences brought to bear against the voters. * * * * * * *

In the morning, or soon after the polls were opened at the market-house, when but few votes were taken, Hugh Louthen and several others applied there to have their votes enrolled, and offered to take the conventional oath. One of the judges objected, and said Louthen insisted upon his right to vote; and one of the judges told him that if he voted he would be arrested. He still said he would vote, and did vote, and I think he was arrested. I cannot say that I saw any one turned off, nor any other intimidation there. * * *

Question. How did you intend to vote between Bruce and Loan?

Answer. I should have voted for Mr. Loan. (Pages 1, 12, and 13.)

Cyrus E. Kemp, clerk of election at St. Joseph, in Buchanan county, testifies as follows:

I was clerk at the election at the court-house precinct on the 4th of November, 1862, at which Benjamin F. Loan and John P. Bruce were candidates for Congress. The election proceeded pretty quietly until about one o'clock. At that time a band of enrolled militiamen entered the court-house, at which time the voters then present dispersed. The judges left the table. I handed my book to Mr. George Merlatt, one of the judges of the election. I saw nothing more of the book until it was returned by Captain Hax, officer of the day, and General Willard P. Hall. The poll-book was returned in about one-half hour after it was taken. The polls were then again opened, and new judges appointed by the bystanders, under the direction of the sheriff. The election then proceeded quietly for about one-half hour. There was a great crowd around the table at that time of persons who had been sworn before voting. Just at this time another company of the enrolled militia, armed, about twenty in number, came into the room and closed around the table, and forced the voters back and scattered them in all directions. Some of them jumped out of the windows. The judges also immediately left the table, and I could not conceal the poll-book in time to prevent the militiamen from destroying it by tearing it to pieces. The militiamen seized my poll-book while I was yet sitting at the table, and tore it into strips, and threw it on the floor. They had muskets in their hands. The election was broken up for the second time, and the polls were not any more reopened at the court-house. * * * * *

Question. State if you know about how many votes had been taken at that precinct prior to the destruction of the poll-books.

Answer. I cannot exactly tell, but think there had been about one hundred votes polled.

Question. If you have any knowledge, state how those votes were cast as between John P. Bruce and Benjamin F. Loan, candidates for Congress.

Answer. I think about nine-tenths of those votes were cast for Mr. John P. Bruce. * * *

On his cross-examination this witness testifies:

There were about twenty who had been sworn and ready to vote. I do not know for certain who they were going to vote for, but my impression was that they were going to vote for John P. Bruce. Just at this time the company of enrolled militia entered the room, and the voters all left the table, being crowded away by the militia, and thus prevented from voting. This was at the time the poll-books were torn up. * * * *

Question. Did any of these twenty men say to you or the judges of election who they were going to vote for for Congress?

Answer. They did not.

Question. Then why do you state that it was your impression that these twenty men were going to vote for said John P. Bruce?

Answer. Simply because the votes were all being cast for John P. Bruce at that time, and that is what I based my impression upon; and I think it was a very correct impression.

Question. How do you know that these twenty men you speak of were legally qualified voters?

Answer. I do not know anything about that; but the judges were willing for them to vote, and that they had taken the conventional oath. (Page 16.)

James A. Matney, one of the judges of the election at the court-house in St. Joseph, Buchanan county, testifies as follows:

About 1 o'clock on the day of the election I came up to the court-house precinct for the purpose of voting. When I came there I found no judges of the election. The clerks were present with their poll-books, also quite a number of persons who seemed to be anxious to vote. After some time spent, the crowd of voters proceeded to elect judges from the bystanders, selecting James B. O'Toole, Robert Clark, and myself as the judges, and were duly qualified by the clerk of the county court to proceed with the election. After five or six votes were taken and entered on the poll-books by the clerks, from fifteen to twenty-five armed men entered, in the dress of the enrolled militia of the State of Missouri, armed with muskets, or such other weapons as the State of Missouri furnished her soldiers, with fixed bayonets. When they entered the room the first word I heard was, "Get away from here, get out from here." I took it that language was addressed to the crowd of voters around the polls, and they so understood it by their actions, as they left as quick as they could get away. As soon as the voters left, and as soon as these armed men could reach the table where the poll-books were lying, they seized the poll-books and tore them to pieces. The crowd of voters being dispersed, there was no further effort made to vote at the court-house precinct that evening. * * * * * * *

Without any intimidation or threats prior to or on the day of the election, there would have been between eight hundred and one thousand more votes polled at the November election, 1862, in Buchanan county, in my judgment. (Page 23.)

P. K. Donnell, another clerk in the court-house in St. Joseph, Buchanan county, testifies as follows:

I was clerk of that election at the court-house precinct. Some time in the afternoon, soon after the polls were opened, a squad of militiamen, of enrolled Missouri militia, came in and violently seized the poll-books and took them off. They were returned in a short time, through interference of the company officers and others, and the election proceeded until again interrupted by a squad of armed men, much more numerous than the last, who again seized the poll-books and tore them into fragments, scattering them around the floor. I do know the names of the persons who did this. At the time this took place there were two pages and a half of the poll-books filled with voters' names and their votes, making the number of voters nearly a hundred, ninety per cent. of which, it is my opinion, were given for John P. Bruce. (Page 37.)

John Scott testifies as to the interference at the market-house precinct, in St. Joseph, as follows:

I attended the election aforesaid at St. Joseph, in Buchanan county. I voted at the market-house precinct early after the polls were opened. Some hours afterwards I was told that the military were interfering at that precinct. I immediately went there to see for myself. The soldiers, without arms, except side-arms, were there in considerable numbers, and they were preventing any one from approaching the polls, except such as they were satisfied would vote the ticket called the unconditional Union ticket, on which was the name of Benjamin F. Loan for Congress. If men insisted on voting the ticket called the Union ticket, on which the name of John P. Bruce appeared for Congress, he was forcibly ejected from the room by the soldiers, and in some instances I saw them kicked down the stairs, and otherwise abused. In the afternoon I was at the court-house precinct, and while there I saw some fifteen or twenty armed soldiers approach with bayonets fixed. They cleared the anteroom, and marched into the room where the polls were opened, and drove the voters out, and, as I was informed, tore up the poll-books. (Page 39.)

A. M. Saxton testifies to disturbance at the court-house and market-house precincts, as follows:

I went to the market-house to vote, and took the conventional oath, which was administered by one of the judges to myself and five or six others at the time. Just as we were in the act of voting several soldiers rushed in and arrested two of the six, and took them to the guard-house. In the confusion I left without voting. About 1 o'clock I went to the court-house, where voting was going on, and again took the oath. The judges had a printed list of names; among the names I saw mine. One of the judges, Mr. Fisher, informed me that he had instructions from Colonel Severance to prohibit every man on that list from voting, as they were disloyal.

As I was about to leave, about twenty German soldiers came in and took possession of the poll-books. I returned down in the town and met Lieutenant Governor Hall coming towards the court-house, with a crowd following. I followed the crowd to the court-house, and saw the governor return the poll-books The judges that were there at first had all gone. Another set of judges were appointed, I think, by the sheriff and county clerk, and voting commenced again. About twenty votes were taken, when the same band of men came in and drove every man out of the court-house, most of them jumped out of the windows. The soldier who seemed to be the leader tore up the poll-pooks into small pieces. The soldiers were loud in hurrahing for Loan, and using bitter epithets against those who were for Bruce. Most of the men at the court-house waiting to vote were from the country, and, so far as my acquaintance extended, were Bruce men. After this fuss I saw the country people leaving in some haste for home, without voting, and I returned to my home without casting my vote. (Page 42.)

Benjamin C. Cunningham testifies as to arrests, &c., at the market-house precinct, as follows:

I went down to the market-house with the intention of voting for John P. Bruce for Congress, but was prevented by persons dressed in the garb of soldiers. I was standing at the market-house precinct, and I think about three men, dressed in the garb of soldiers, said that the election should stop, and put all the voters and everybody out of the house. I went back the second time to vote, and was arrested and taken to the guard-house; after a few moments I was released, and I did not attempt to vote any more.

Question. What party seemed to be making this disturbance—the friends of B. F. Loan or John P. Bruce?

Answer. I think they were the friends of Mr. Loan.

Question. What do you think would have been the difference in the election if it had been conducted fairly?

Answer. I think that John P. Bruce would have gotten eight hundred or one thousand more votes if the election had been conducted fairly. (Page 43.)

John J. Abell testified as to disurbances at the market-house as follows:

I am a resident of St. Joseph, Missouri, and have been for nine years, and am engaged in selling drugs in this city. I attended the election in November, 1862, for congressmen and other officers. Soon after the polls were opened I started to the market-house to vote. I then heard that persons were being arrested for voting. I went to General Hall, who was in command, and told him that they were arresting persons, when he expressed great surprise. I told him that I wanted to vote, but I did not want to be kept in the guard-house or jail. I then went and offered to vote, and there was considerable hesitation with the judges whether they would receive my vote or not; but they did receive my vote, and as soon as I voted the guard arrested me. I asked him why he arrested me. He then showed me a printed list of between eight and nine hundred names. My name was on that list, and he was ordered to arrest all whose names were on that list. I asked him who gave him such authority. He said by order of Captain Hax, who was officer of the day. I was then taken to the guard-house, where I found eight others; and myself and the others received a great deal of abuse from a parcel of Germans who were on guard there. When I went to General Hall he told me that if I was arrested to let him know. When I was taken by the guard, I wrote to General Hall that myself and eight others were confined in the guard-house for voting. He sent down and had us released. On leaving the guard-house I picked up one of the lists of those who were to be arrested if they attempted to vote, and have got it yet. It was soon rumored around that I had the list of those who were to be arrested for voting, and persons were calling nearly all day to see if their names were on the list, and if they were they did not attempt to vote, saying that they did not wish to be interrupted. I have no doubt that all those who were on that list were the friends of John P. Bruce, and I think that the most of them would have voted for John P. Bruce if there had been a fair, peaceable election. After I went to General Hall I went and voted. He told me that he wanted to know if they were arresting men for voting, and I wrote to him, as I have already stated. I think that those who created the disturbance were the friends of B. F. Loan. (Page 44.)

Thomas Colligan testifies as to the extent of the interference at St. Joseph as follows:

I am a citizen of St. Joseph, Missouri, and have been for thirteen years, and am forty-one years old, and am a clerk in a banking-house; have been a member of the enrolled militia, and served four months. I was present at the election held in November, 1862, for congressmen and other officers in Buchanan county, Missouri; as I was going to the court-house to vote I met the judges of the election coming from the court-house, and understood from them that the election at that precinct was broken up by the soldiers. I was in the enrolled militia at that time. I had my ticket filled, and intended to vote for John P. Bruce, for Congress, and did not attempt to vote at any other precinct on account of the interference of the militia and others. Those who were the friends of B. F. Loan created the disturbance, and prevented myself and others from voting by intimidation. The intimidation kept a great many from voting, who I believe would have voted for John P. Bruce. In the opinion of many persons, John P. Bruce's election would have been effected by eight hundred or a thousand voters who did not come to the polls on account of the intimidation. I saw a good many persons arrested, and understood that they were arrested for attempting to vote. (Page 45.)

D. J. Heaton testifies as follows:

I have resided in St. Joseph, in Buchanan county, Missouri, about seventeen years; am fifty-five years of age, and am an undertaker. I attended the congressional election in November, 1862, a greater portion of the day, and became disgusted by the manner in which the election was being conducted, and went home and did not vote at all. I filled out some tickets for several men to vote, but they were told that they could not vote that ticket; that if they did they would be arrested. The tickets that I filled up were generally conservative tickets. Those interfering with the election were members of the enrolled militia, and were the friends of B. F. Loan. (Page 45.)

Edward J. Knapp testifies as follows:

At the Allen House, in the first ward, I saw an old man, John Cowie, seventy-five years of age, a lawful voter for forty years, and a peaceable, quiet man, went up to the polls, presented his vote to the judges; the judges commenced calling off his vote, and a member of the enrolled militia, a German, with his uniform on, stepped up and took Mr. Cowie by the back of the neck or coat and jerked him over on to the floor, and the first place struck was his head and shoulders, and the blood gushed from his nose from the fall. Mr. Cowie was then voting what was then called here the democratic ticket.

In addition to the foregoing evidence, the record contains other testimony intending to show interference with the voters at other precincts in St. Joseph Reference is made to the testimony of O. M. Loomis, (page 10,) who testifies as follows:

Directly after I had voted, a Dutchman came up there and told the judges that if they did not take my name off the books he or they would tear them up. I had voted for John P. Bruce for Congress.

It is impossible to determine either the precise extent of the interference complained of, or to ascertain definitely the number of legal voters who were prevented or deterred, by the violence and threats of the armed militia and others, from voting. The committee have inserted a comparison of the vote cast in Buchanan county at the election immediately preceding and succeeding the one in question. From that it appears that a greatly diminished vote was cast in Buchanan county in 1862, as compared with the vote in that county at the other elections referred to. Figures are given also to show that there was not the same relative difference in that part of the same county where the election was not controlled by the militia.

Buchanan county.

The vote for President in this county in 1860, (page 148) was	3,979
The vote for congressman in 1862 in this county (page 147) was	2,268
Falling off in the vote in 1862 was	1,711

Vote in Washington township, in Buchanan county, where the chief interference was. This township embraces the city of St. Joseph, in which city all of the polls for that township were held. St. Joseph is the county seat of Buchanan county:

The vote at St. Joseph for President in 1860 (page 53) was	2,420
The vote at St. Joseph for congressman in 1862 (pages 53, 54) was	910
Falling off of vote in township in 1862 was	1,510

Vote outside of Washington township, embracing the remainder of Buchanan county, where there was comparatively slight interference:

The vote for President in 1860 outside of Washington township (page 53) was	1,559
The vote for congressman in 1862 in the same territory was	1,366
Falling off in that place only, in 1862	193

The legislative vote in 1860 in Buchanan county, when the contestant was a candidate, cast for him, was as follows, compared with his vote in 1862:

John P. Bruce received in 1860	1,585
John P. Bruce, for Congress, in 1862, received	635
Falling off in his vote in 1862 was	950

The decrease in the vote of Mr. Bruce in 1862 from that of 1860 was chiefly in Washington township, as will be seen by the following comparison of the votes in that township between the two years:

Vote of John P. Bruce in Washington township in 1860	1,074
Vote of John P. Bruce for Congress in 1862	158
Falling off	[redacted]16

His vote in 1860 in Buchanan county, *outside* of Washington township, was	511
His vote for congressman in the same portion of the county in 1862 was.	477
Showing a falling off in the county outside of Washington township of only	34

The foregoing statements show that the contestant's diminished vote in 1862, in Buchanan county, as compared with his vote in 1860, was confined almost entirely to the township of Washington. The testimony shows that the violence and intimidation used in Buchanan county were confined chiefly to that township, and were directed solely against the contestant and his supporters. The committee are satisfied that such violence and intimidation deterred over nine hundred voters from the polls in that township alone. The committee are strengthened in this view by a comparison of the vote given in Buchanan county in 1862 and in 1863, which is as follows:

Comparison between the vote of 1862 *and* 1863 *in Buchanan county.*

The vote for supreme judges in 1863 was	3,300
The vote for congressman in 1862 was	2,268
Showing an increase in the votes in one year of	1,032

The contestant ran in 1862 on what was called the Union ticket, and it received in the entire county of Buchanan that year 635 votes only. In 1863, the judges who ran on the Union ticket received, in Buchanan county, 1,564 votes, an increase from 1862 to 1863 in this county of 909 votes. The contestee, in 1862, ran on what was known as the unconditional Union ticket, and he received in the county of Buchanan that year 1,633 votes. In 1863, the judges who ran in opposition to the Union ticket received that year 1,763 votes, being an increase from 1862 to 1863 of only 130 votes. This shows that the violence used produced the desired result; it diminished the vote of the contestant, rather than that of the contestee.

INTERFERENCE IN ANDREW COUNTY.

James R. Watts, who was postmaster at Savannah, and one of the judges of the election, and who voted for the contestee, swears that there was an interference with the voters of the polls where he presided, but it being outside of the window where the votes were received, he could not state from what or whom the interference came.

(Page 51.)

Hamilton Smith, who voted for the contestee, testifies in regard to the election at Savannah, as follows:

I was at Savannah, the county seat of Andrew county, Missouri, on the day of election referred to. I was frequently at the voting place during the time that I was there: there was a crowd around the window, keeping up a continual noise and confusion, and saying that they would not allow secessionists to vote. I saw a Mr. Hosford, a qualified voter, go to the window, and while being sworn an individual of said crowd was stamping on said Hosford's foot, and while feeling for his ticket in his pocket he was crowded back from the window and was not allowed to vote. I saw his ticket: he was going to vote for John P. Bruce for Congress. I saw another individual pushed away from said polls by the crowd aforesaid; this last named individual was by the name of McCrury. I applied to the judges of said election to maintain order, and I also applied to Lieutenant-Colonel Commanding Nash, of the enrolled militia, to maintain order; said Nash stated that if called upon by the civil authorities he would do so, if he could, but doubted whether he would be able to maintain law and order on that day.

Question 3. To whose election to Congress was the crowd who were thus interfering with voters favorable from what you heard them say?

Answer 3. So far as I could learn, they were for General Loan.

Question 4. How often were you at the polls at Savannah, on the day of the election?

Answer 4. Six or eight times.

Question 5. Did or did not the crowd alluded to above continue the aforesaid interference with voters at the several times you were at the polls?

Answer 5. They did.

Question 6. Did you see any friend of John P. Bruce interfere with any one desiring to vote for B. F. Loan?

Answer 6. I did not.

Question 7. Do you know the character of the crowd that was interfering with voters on said day at the polls?

Answer. 7. They were mostly enrolled militia.

Question 8. Do you know that there were many voters who came to Savannah on that day to vote who did not vote on account of the interference of said crowds?

Answer 8. I do.

Question 9. State, from what you know and saw at the polls, whether or not it was not difficult for a man who wanted to vote for John P. Bruce to do so.

Answer 9. So far as I know, it was.

Question 10. State, from what you know and saw, whether the enrolled militia around the polls offered any objections to voters voting for Benjamin F. Loan?

Answer 10. They did not.

Question 11. Was it not your understanding that the intimidating language, and the remarks by the crowd that they should not vote, applied to persons who would have voted for John P. Bruce, if they had not thus been deterred from voting?

Answer 11. As far as I know, it was.

Question 12. Do you know of any person who had returned from Price's army, or any other rebel officer's command, offering to vote on the day of said election?

Answer 12. I do not.

Question 13. Are not many persons of your acquaintance, of the class alluded to by you as reputed rebel sympathizers, loyal citizens, for the Constitution as it is, and the Union as it was?

Answer 13. My opinion is that a large mass of those who are reputed as rebel sympathizers are loyal, and for the Constitution as it is, and the Union as it was.

Question 14. Are not democrats and conservative men in this section very often denominated as rebel sympathizers?

Answer 14. They are.

Question 15. Are you personally acquainted with John P. Bruce, the contestant, and have you had an opportunity of learning his politics; and if so, do you regard him as having been, during these troubles, and being now, a loyal Union man?

Answer 15. I am acquainted with him, and have always considered him loyal.

Robert Elliot, who was 74 years of age, and had resided in the county for twenty-four years, testifies as follows:

I did attend said election on that day, at Savannah, Andrew county, Missouri. I went up to the polls in the morning to vote at Savannah, and there was considerable crowd around the place of voting. I asked Captain Hobson to assist me to the polls, as I had two lame hands; my shoulder was out of place, and a rising on my other hand. Said Hobson made me no reply. I then left the polls, no one saying anything to me; I was unable to get to the polls. I returned to the polls again in about an hour, and made another effort to vote; was met by an individual that I did not know at that time, but have learned his name since; he is known by the name of Stockweather, I learn. As I advanced to the polls to get a vote, said Stockweather met me and told me that I could not vote there. I advanced as near to the crowd around the polls as I could yet. I was replied to by said Stockweather that if I staid there until sundown, I could not get to vote. I then retired and applied to some of the candidates to see if some order could not be produced, so that I might be able to get to the polls to vote. I then made a third effort to vote, but was met by a friend of mine, who told me that I had better retire, and not be insulted in that way. I told many who had not voted how I had been treated, and I made no further effort to vote, and did not vote at said election. I considered it dangerous for me to attempt to vote. I think I would have been badly hurt if I had tried any longer to vote. I would have voted for John P. Bruce. I conversed freely with others who had not voted, and there was a proposition on their part to go to other precincts in the county and vote, as they could not vote here. I had a conversation with Judge Castle, and he told me that there was perfect order at the precinct near him, which is about six miles from Savannah. These persons that I talked with, I am of the opinion that they were generally for John P. Bruce. (Page 79.)

George W. Samuel testifies, (page 82, answer 11,) that he was present at the polls, *and that there was* interference with voters, and a discrimination

by the crowd as to who should vote, and for whom the votes should be cast, and expresses the opinion that the vote for the contestant would have been four hundred larger in the county had there not been any interference.

Jacob Hittibida (on page 85) testifies as follows:

I was at said election on said day at Savannah, Andrew county, Missouri. Saw no one interfered with in trying to vote except myself. When I started up to the polls to vote there was considerable crowd about the window. I remained within a few steps of the window until more voters were called. I then started to the window for the purpose of voting. There was a man met me. He was a stranger to me by name. I had seen him frequently before and since. He said to me, Damn you, you cannot vote; if I attempted to he would knock me down; and he shook his fist at me, almost touching my face. My reply to him was that he was certainly mistaken in the person. This occurred in the morning of said election, probably between the hours of nine and ten o'clock. I then went to my mill, which is in Savannah, Missouri, the precinct where I attempted to vote. In the evening of that day I supposed that the crowd around the polls had dispersed, and that I would try again to get to vote. I went the second time to try to get to vote, and succeeded in getting to the window, the place of voting, and got my hand in the window, and had my ticket in my hand to vote, and just as one of the judges reached his hand to get my ticket there was a stout man came up behind me and whirled me around and gave me a push, and placed himself in the window, the place of voting. Two of the judges of the election observed to this man to go away and let me vote, as I was entitled to a vote, and that he had laid himself liable to a heavy penalty. He observed that he did not care a damn. He remained in the widow during the time I was near the polls. The judges called to me to come and vote; and I observed to them that I was not willing to risk my life for the sake of voting. I then left, and did no try to vote that day; it was then sundown, or very near it.

Question 3. Whether, to the best of your knowedge, the crowd around the polls causing the disturbance and interference were favorable to the election of Benjamin F. Loan or John P. Bruce?

Answer 3. I think they were favorable to Benjamin F. Loan. One reason for my thinking so is that there was a young man by the name of Miller, whom I have known ever since he was a child, and he said to me, on the day of the election, at the time I was trying to vote, "Uncle Jake, we do not want any democrats to vote."

Question 4. Did you know of any man in the crowd, or around the polls, trying to intimidate any one who came there to vote for B. F. Loan?

Answer 4. No; I saw no signs of anything of the kind, for I was there around the polls during that day only about twenty-five or thirty minutes altogether.

Joseph B. Nichol (at page 88) testifies as follows:

I was at the Savannah precinct, in said county of Andrew, on that day. I saw interference with men who were attempting to vote. I voted about eleven o'clock on that day. Attempts were made to prevent me from voting by challenging my vote, and attempting to push me from the polls. I saw at different other times men attempting to vote pushed back from the polls and prevented from voting. There appeared to be an organization around the polls to prevent certain men from voting. I frequently heard the cry, "Union men to the polls and rebels to their holes," or "tories to their holes," or "secessionists to their holes." Many of those attempting to vote were held back, kept back, or thrown back, with considerable violence, both of words and gestures.

Question 3. State whether, to the best of your knowledge, the crowd around the polls causing the disturbance and interference were favorable to the election of Benjamin F. Loan or John P. Bruce.

Answer 3. According to the best of my knowledge they were in favor of Loan.

Question 4. State, to the best of your knowledge, whether the men thrust from the polls were not supporters of John P. Bruce; whether they would not have voted for John P. Bruce if permitted to vote.

Answer 4. I know that some of them expressed themselves for John P. Bruce, and some I did not hear express themselves at all. Those who expressed themselves for Bruce expressed that they desired to vote for him.

Question 5. State, from the complexion of the crowd that took possession of the polls at said election, whether they were militiamen or civilians, and what proportion.

Answer 5. My impression is, that the most of them, or a large portion of them, were militiamen.

Question 6. State whether they had arms; and if so, how many; and whether you do not think, from what you saw and heard on that occasion, that it was hazardous to a man's life to attempt to vote for John P. Bruce after the time you voted.

Answer 6. I did not see any arms. I am satisfied that many would have been hurt if they had further attempted to vote after having been once checked.

Question 8. State whether or not, on that occasion, the conduct of the crowd around the polls was not boisterous, threatening, and dangerous, and excelled anything in the history

of voting in said county; and if you have ever seen men thrust from the polls in this county as on that occasion.

Answer 8. It was boisterous, and appeared to be dangerous. It excelled anything I ever saw or heard of in the history of voting in said county. If a full expression of the voters could have been had on that occasion John P. Bruce's vote would have been greatly increased. I am satisfied in my own mind, and my opinion is, that in the neighborhood of two hundred at the Savannah precinct were prevented from voting, or did not vote on account of seeing others who were prevented from voting. As to the number prevented from voting at other precincts in the county I cannot say.

Question 11. State whether or not it is your opinion that all who desired to vote for Loan, at said election, were permitted to do so at said precinct.

Answer 11. I think so.

On cross-examination by the contestee, this witness testified:

Question, Do you know, or have you heard, that there was any interference with voters at any other precinct in Andrew county, except at Savannah, at said election?

Answer. I have heard that there was such interference at Fillmore, Whitesville, and Amazonia.

The committee insert the following statements to show the decrease in the vote at Savannah from the year 1860 to 1862, much of which, in their opinion, is attributable to the interference at the polls:

Savannah precinct, Andrew county.

The vote for President in 1860, at this precinct, was	866
The vote for congressman in 1862, at same place, was	330
Falling off at this precinct alone in 1862 was	536

Fillmore precinct, Andrew county.

The vote for President in 1860, at this precinct, was	306
The vote for congressman in 1862, at same precinct, was	142
Falling off at this precinct in 1862 was	164

Rochester precinct, Andrew county.

The vote for President in 1860 was	338
The vote for congressman in 1862 was	182
Falling off at this precinct in 1862 was	156

Waterville precinct, Andrew county.

The vote for President in 1860 was	235
The vote for congressman in 1862 was	195
Falling off in 1862 was only	40

Amazonia precinct, Andrew county.

The vote for President in 1860 was	85
The vote for congressman in 1862 was	71
Falling off in 1862 was only	14

A statement of the entire vote of Andrew county in 1860 and 1862.

The vote for President in 1860, in entire county	1,912
The vote for Congress in 1862, in entire county	1,112
Falling off in 1862, in entire county, is	800

LIVINGSTON COUNTY.

Thomas R. Bryan, one of the judges of the election at Chillicothe precinct, in Livingston county, testified as follows, (page 102:)

I attended the election at Chillicothe; was one of the judges of the election. After the election had progressed some time, Lieutenant Colonel Jacobson, of the Missouri 27th regiment, marched into the court-house where the voting was going on, with some twenty or thirty armed soldiers. When he came up I read to him General Willard P. Hall's order that the judges of the election were to be sole judges of the qualification of voters, and the military was not to interfere. Lieutenant Colonel Jacobson then said he disregarded the order of General Hall, and I said I would report him. Lieutenant Colonel Jacobson then said to Dr. Hughes, who was standing close by: "Any man you will point out as an illegal voter I will take him out of the house." Afterward the judges swore several men, and out of that number Hughes first pointed out James Hutchinson, and said he was feeding bushwhackers: and James Hutchinson was the first one of that lot that offered his ticket to vote, which I took. Lieutenant Colonel Jacobson ordered his men to take Hutchinson out of the house, which they did; then there seemed to be a good deal of confusion in the house. Mr. Berry, one of the judges, said we would not go on with the election until order was restored. During the interruption Dr. Hughes made a motion that they organize the election over and elect new judges, and then proceed with the election, and no one sanctioned it. During the time we were waiting for order to be restored the telegraphic operator brought in a despatch to Lieutenant Colonel Jacobson, which I understood was from Governor Gamble. Lieutenant Colonel Jacobson then remarked to the judges that then they might have it their own way, and took his soldiers and left.

Question. Did Lieutenant Colonel Jacobson and the soldiers that were with him offer to vote?

Answer. They did not.

Question. Was Dr. Hughes an officer of the election?

Answer. He was not.

Question. Who is Dr. Hughes? What was his occupation at the time referred to, and what his politics?

Answer. He was editor of the Chillicothe Constitution at this place, and I regard him as a radical abolitionist.

Question. Did any of the voters that were sworn at the same time that James Hutchinson was vote at the time said Hutchinson was taken away from the polls?

Answer. I recollect that Robert Steen, one of the lot sworn at the time referred to, voted during the confusion. He (Steen) called on Lieutenant Colonel Jacobson to make the judges let him vote, and I told him we needed no making, and he handed me his ticket and voted the emancipation ticket.

Question. What effect did the aforesaid interference of Lieutenant Colonel Jacobson and his armed soldiers have upon the election and the voters?

Answer. My opinion is, that a great many of the country people went home without voting.

John Garr, senior, another of the judges, on pages 105 and 106, corroborates the statement of Mr. Bryan, and adds the following, among other things:

I attended the election at Chillicothe as one of the judges; we came in to open the polls and expected to have some disturbance, for this reason, that I saw the military going to Spring Hill, in Jackson township, in this county, and I saw a poster near the gate at the entrance to the court-house yard, and one in the court-house where the polls were opened: they were large, printed posters, with the words on each end: "Special order! No disloyal person shall be allowed to vote." We had received but few votes, when Dr. A. S. Hughes came in and told us that no disloyal person should be allowed to vote there: the first vote he objected to was John Garr, jr., because he had stated, if he could not vote the ticket he wanted to he would vote for black Bill; this objection was overruled, and he voted. Hughes objected to two or three or more on the ground that they were disloyal, but they were allowed to vote. About this time Lieutenant Colonel Jacobson, with his military force, appeared at the polls, and he gave us orders that we should not receive the vote of any disloyal person, and Dr.

Hughes was to point them out, and if they attempted to vote, he (Jacobson) would take them out of the house. I told him we would go by the law of the State convention, Governor Gamble's orders, and General Hall's instruction, and to the letter of the law as we understood it; he then went and brought into the court-house a part of his soldiers to take said Hutchinson out. Captain R. S. Moore, of the enrolled militia, ordered Lieutenant Colonel Jacobson to halt; said Jacobson pressed Moore aside and said, I will overpower you; Captain Moore replied, I surrender; the lieutenant colonel (Jacobson) then pushed said Hutchinson violently towards the military, and they then put him out of the court-house. Dr. Hughes said the election was a farce, and called on the loyal people to sustain him and the country, and to come to him and they would open a poll of their own, which created a considerable row. Then I went to Colonel Shanklin to send a despatch to the governor, which he sent, and received for answer that the said 27th regiment must leave the court-house and go to their quarters, which they did. * * * * *

Question. Are not all men who are for the Constitution as it is, and the Union as it was, called disloyal in this section by the class of politicians to which Dr. Hughes belongs?

(Objected to by A. S. Harris, agent for B. F. Loan.)

Answer. That is my understanding; that they class all such with the secessionists, or as disloyal.

Jacob L. Myers, (page 107,) who was the clerk of the election at the Chillicothe precinct, testifies as follows:

I was chosen by the county judges as clerk of that election at Chillicothe precinct, and acted as such on the morning of the election. Early in the day I saw Dr. Hughes putting up posters, on which was, "that no disloyal person should vote." Fearing that a difficulty would likely originate from this thing, I did not want to act as clerk. The judges insisted I should, and I did. We opened the polls, and some votes were taken, when Dr. Hughes interfered, challenging votes. The judges got into a controversy with said Hughes, and wanted to know on what grounds he objected. They told him they had the ordinance of the convention to go by, and the oath therein prescribed to administer to voters, and they had no right to reject any man that would take this oath. Hughes then gave the judges to understand that there would be a squad of men here to see that none but loyal men, such as he claimed to be, should vote. In a few minutes the squad of men were right in our midst. Lieutenant Colonel Jacobson, of the 27th Missouri regiment, at the head of some twelve or fourteen men, armed and equipped with United States muskets, gave the judges to understand that no man, or no set of men, should vote that was disloyal to their government. At that time we were recording James Hutchinson's vote. Said Hughes challenged his vote, and Lieutenant Colonel Jacobson ordered Hutchinson to get out of the house; that he should not vote. Said Hutchinson called on said Hughes to bring up any charge where he was disloyal. Hughes replied that he (Hutchinson) sympathized with or aided bushwhackers, or was aiding the party opposed to the government. Lieutenant Colonel Jacobson then ordered his squad to put Hutchinson out of the house, which they did. That being the case, the judges notified Lieutenant Colonel Jacobson that they were the judges, and acting under oath, and protested against his actions, and demanded of him and his squad to retire, or they would adjourn the election. He would not do it, and the judges postponed the election for the time being. Colonel Shanklin, of the enrolled militia, requested the judges to hold on; that he would telegraph to the governor. We waited a space of time. The squad of soldiers remained in the house in a threatening attitude towards the judges and clerks, and talking of making them take votes. After a while I folded up my poll-book and put it in my pocket. A despatch came from the governor, after a while, requesting Lieutenant Colonel Jacobson and his squad to withdraw. After the said lieutenant colonel read it they retired; Dr. Hughes became insulted, and left with them—at least, I thought he was insulted. After that we opened the polls, and voting commenced.

Question. What effect had the aforesaid interference on the voters, from what you saw and knew?

Answer. It created a great excitement, and prevented a great many from voting, through fear.

The committee insert the following statement to show the difference in the vote between 1860 and 1862 in some of the precincts, and in the county of Livingston:

Chillicothe precinct.

The vote for President in 1860 was	619
The vote for congressman in 1862 was	265
The falling off in 1862 in this precinct was	354

The vote for supreme court judges in this same precinct in 1863 was ..	512
The vote for Congress in 1862 was	265
Increase in vote in 1863 in same precinct	247

County of Livingston vote.

The vote for judges of supreme court in 1863.....	963
The vote for congressmen for 1862 was, in the entire county.....	683
The difference is in favor of 1863, of.....	280

From this statement it appears that the increase in the vote of the entire county of Livingston in 1863 over the vote of 1862 was 280, and that 247 of this increase was in the precinct of Chillicothe alone, where the interference with the election is proven to have occurred.

The vote for President in 1860 in Livingston county was	1,469
The vote for congressman in 1862 was	683
Falling off in 1862 was, in the county.....	786

ATCHISON COUNTY.

Silas Puryear, an attorney-at-law, who was in the town of Rockport on the day of the election, testifies as follows, (page 115:)

I had heard previous to the day of election that there would be interference, and on the morning of election was fully satisfied such would be the case from seeing a number of enrolled militia in town with arms. Soon after the time for opening the polls, I heard on the street that William Hunter, who was a justice of the county court, John Smelser, William King, and others, had been prevented from voting. I did not myself go to the court-house, but was near enough to see that the door was guarded by militia, with guns, bayonets, &c. There were a good many men in town who did not attempt to get in to vote after seeing how things were conducted. I did not myself. I talked with E. L. Clark, one of the militia, and remarked that I supposed it was not worth while for me to attempt to vote. He said it would be useless; that they were acting under the orders of General Curtis.

Question. What did you understand E. L. Clark, one of the militia, to mean when he said he was acting under the orders of General Curtis, and what did you understand the militiamen were doing with the election?

Answer. I understood that the militia had construed some order of General Curtis to authorize them to superintend and control the election, and to decide, independent of the judges of election, who was and who was not entitled to vote: and such they did, in fact, do. The voting was in one of the offices, the only door to which was inside the court-house, and the outer door was guarded by militia.

Question. What was the character of the representations made to you by parties who had attempted to vote that deterred you from voting?

Answer. Some of them were very rudely thrust from the door and threatened with violence: one of them, Sampson Doughty, was pushed down, and I heard, though not from him, that a stone was thrown at him.

Question. Who were these voters for that were prevented from voting for congressman?

Answer. So far as I know, they were for John P. Bruce. I had heard, previous to the day of election, that voters would not be permitted to vote for Bruce. It is my opinion that from two hundred and fifty to three hundred were prevented from voting for said Bruce. Most persons whom I heard express an opinion, put the number at three hundred in Atchison county.

This witness further testifies that he was employed by the contestant to take evidence in Atchison county for him relative to this contest, and says:

Question. State the reasons why you did not take the depositions.

Answer. The reasons are partially given in the letters above referred to. I heard on several occasions that said Bruce would not be allowed to take depositions in said case: that if he came for that purpose, he would be mobbed. These threats, I understood, were by A. B.

Durfee, esq. I also heard threats of mobbing any one who would act as his counsel. Notwithstanding, I spoke to Jacob Hughes and William Sparks, the two justices of the peace, who promised to attend and take the depositions, but the day before the day for taking said depositions Sparks informed me he would not act; that the militia would not permit the taking; that when witnesses came they would be spattered with rotten eggs. I then went to see Judge Needles, who promised to attend if well enough. On my return to Rockport I was informed there was a notice posted up requiring me to leave the county, on pain of being hung if found in the county next day. After reflecting on all the circumstances and threats, I was convinced that the depositions could not be taken, and that to attempt to do so would result in the witnesses being abused, and perhaps endanger their lives. The witnesses were mostly old men and the best men in the county, and I thought it best not to endanger nor expose them to insult, when nothing could be accomplished by so doing.

Question. Did you, at any time on the day of said November election in 1862, or after the same, converse with the witnesses whose depositions John P. Bruce desired you to take in regard to the election aforesaid?

Answer. I conversed with some of said witnesses on the day of election, and with some of them afterwards.

Question. State, from what they told you, what you would have been able to prove by those you conversed with.

Answer. I expected to prove, by several of them, that they were rudely thrust away from the polls, both at Rockport and at other voting places in the county; that they saw the polls guarded by bands of military, both at Rockport and at other voting places in said county; and that a great many legal voters were prevented and deterred from voting by the improper conduct of said militia; and that, in their opinion, John P. Bruce lost, by such interference, about three hundred votes in said county. This is what I expected to prove from the conversation I had with the witnesses.

Question. State, from conversing with the witnesses and others, if the interference of the militia was not carried on at all the voting places in the county pretty much in the same way it was at Rockport.

Answer. I understood that the same kind of interference was carried on at all of the voting places in said Atchison county, except at Irish Grove precinct and at Linden. At Linden I understood the attempt was made, but prevented by Thomas Shrack.

ROCKPORT, *March* 5, 1863.

DEAR SIR: I have just returned from Judge Needles's. I found him not well, but he promised to come up to-morrow if well enough. I am, more than ever, convinced that we cannot take the testimony. On returning this evening, I was informed that a notice was posted up requiring me to leave the county before to-morrow, threatening me with death if found in the county after that time. Under all the circumstances, I shall not attempt to take depositions, as to do so would only result in having myself and the witnesses abused

Yours truly,

S. PURYEAR.

JOHN P. BRUCE, Esq.

Reference is hereby made to the letters above mentioned, which are printed on pages 119, 120, and 121, for further particulars as to inability to procure more testimony in Atchison county.

Vote in Atchison county.

The vote in Clay township, at Rockport precinct, for President in 1860 was	366
The vote for congressman in 1862, there being interference, was	134
The falling off in 1862 in this precinct was	232
The vote in Clark township for President in 1860 was	59
The vote in same township for congressman in 1862, there being no interference, was	59
No falling off.	
The vote in Benton township for President in 1860 was	40
The vote in same township for congressman in 1862 was	36
Falling off of *only*	

The vote for the entire county of Atchison for President in 1860 was..	941
The vote for the entire county in 1862 for congressman was.....	675
Falling off in 1862 was.....	266

VOTE IN DE KALB COUNTY.

John C. Brooks, (page 132,) who was constable of Washington township, and superintended the election, testifies as follows:

I attended at Stewartsville, the voting place for Washington township, in De Kalb county, Missouri, at the said election, and was constable, as the law made it my duty to superintend the same. During the time of the election I saw two men driven from the polls by the enrolled militia, to wit, Harrison Boaz and George W. Rose. The soldiers told Harrison Boaz and Rose that they could not vote, and had to get away from the polls. It being my duty as a civil officer to keep the peace, I made efforts throughout the day to see that every qualified voter had access to the polls. During the whole time I met with opposition from the captain of the company of the enrolled militia, whose efforts were all made in favor of Loan, and to prevent all persons from voting the Bruce ticket. I am satisfied that the captain ordered his men to take one vote from me whilst Wm. Moore was writing his ticket, and afterwards they brought up the same man with a Loan ticket and coerced him to vote different. The man told me to make out his ticket for Bruce, as he wanted to vote for him. This statement was made to me before the soldiers took him away.

Question. State your opinion, from all the facts that came to your knowledge, how many voters were prevented from voting by intimidation or interference by the enrolled militia or others with the polls, and with voters from voting on the 4th day of November, 1862, at the election in De Kalb county, Missouri.

Answer. I cannot say exactly how many voters were thus prevented, but I am satisfied that if there had been no interference with the election in 1862, John P. Bruce would have carried De Kalb county by a majority of over one hundred votes for Congress.

Andrew J. Gibson testifies as follows, (page 133:)

I attended the election at Stewartsville on the 4th day of November, 1862, and I went down to the polls late in the evening, having been at work all day, with the intention of voting. Just as I got there the enrolled militia were running off from the polls Harrison Boaz, who had a ticket in his hand to vote, and from conversation I had with Boaz it was a Bruce ticket he desired to vote. When I saw this I was afraid to vote, as I had a Bruce ticket and intended to vote for him for Congress, and I thought if they run Boaz off, who was a larger man than me, that there was not much chance for a small man like me to vote. From what I saw of the conduct of the enrolled militia, who were friends of Benjamin F. Loan, I was satisfied that there was not much chance there for the friends of Bruce to vote. Those who wanted to vote for Loan had no trouble to get to vote. The effect was to prevent men from voting for John P. Bruce. The militia had side-arms, and appeared to be boisterous and noisy, and I considered it dangerous to offer to vote for John P. Bruce for Congress. I think if I had had a Loan ticket I could have shot it in mighty nice. Captain McDonald was in command of the company of enrolled militia that day.

Duff L. Vaughan testifies as follows, (page 134:)

State what occurred whilst you were at said election.

Answer. Whilst I was in town I ascertained that no man could vote without he went the Loan ticket. As I intended to vote for John P. Bruce for Congress, I left town, and did not vote.

Question. How did you understand this was to be effected?

Answer. I understood that the bayonets were guarding the polls; and I saw the enrolled militia with guns on the platform near where they were voting, and I understood from the bystanders and the crowd around that the militia would not let any one vote unless they voted the Loan ticket.

Question. Did you hear of any threats previous to the election that men would not be permitted to vote for John P. Bruce?

Answer. I heard some of the militia say that nobody would be permitted to vote for John P. Bruce; that nobody should vote for him at the Stewartsville precinct on the day of the election. I heard this some days before the election.

Question. If there had been no interference by the enrolled militia, nor no intimidation, what would have been, in your opinion, the result of the race for Congress between John P. Bruce and Benjamin F. Loan at the election in De Kalb county, November 4, 1862?

Answer. I believe, from the best of my knowledge, that John P. Bruce would have carried the county of De Kalb by a majority of one hundred and fifty votes.

Question. Are you pretty well acquainted with the people of De Kalb county?

Answer. I am; and have frequently canvassed the county. I do not think there is any man of my age better posted as to the county than I am.

Mr. Harrison Boaz testifies as follows, (page 135:)

I did attend the election at Stewartsville on said day, and had been engaged all day in bedding the cars for cattle to be shipped off on the Hannibal and St. Joseph railroad, and in the evening came in to vote with a ticket with the name of John P. Bruce for Congress on it; and when I presented myself at the polls John Crowley, a member of Captain McDonald's enrolled militia, said to me, "What are you coming here for?" I replied, "To vote." He said, "God damn you, leave, or I will knock you out," and he drew his fist back to hit me. There were by at the time about ten or twelve men of the enrolled militia; some of them with side-arms. I got away from them as quick as I could, and did not come down into town that evening any more. This was the first time I was ever prevented from voting before, and I said I believed that I never would try to vote any more. I should have voted for John P. Bruce for Congress, if the enrolled militia had not thus interfered.

Question. Did you know or hear of any interference on the part of the friends of John P. Bruce to prevent persons from voting for Loan or Branch for Congress?

Answer. I did not.

Question. Do you know of any particular reason why you were prevented from voting?

Answer. None, unless that I was going to vote for John P. Bruce. I had always been as loyal to the Union as any man in the State.

James D. Arterbury testifies as follows, (page 136:)

I was at Stewartsville on said election, and was on duty as a member of the enrolled militia in camp; I was at the polls at one time during the day, when George W. Rose, attorney-at-law, was told, when he offered to vote, that he could not vote; this was done by members of Captain McDonald's company of enrolled militia; when they told him this he walked out of the house where they were receiving votes, and did not persist in an attempt to vote. There were a good many of the enrolled militia in the house at this time, and they had side-arms; they seemed to be determining who should vote, and who for.

Question. Who were these enrolled militiamen for, who refused to let George W. Rose vote, as their choice for Congress?

Answer. For Ben. Loan.

Question. Were any of the enrolled militia for John P. Bruce for Congress?

Answer. Several of Captain McDonald's company were.

Question. Did any of the enrolled militia who were for Bruce for Congress interfere to permit any one from voting for Loan or Branch, or any one else?

Answer. No, sir, not that I know of.

Question. Did you or not understand, from what you saw and heard on the day of said election, that the object of the enrolled militia, who were the friends of Loan, that they were there to prevent men from voting for John P. Bruce for Congress, and did so prevent voters from so voting?

Answer. Yes, sir.

George W. Rose, an attorney-at-law, testifies as follows:

George W. Rose, of lawful age, being produced, sworn, and examined on the part of the contestant, deposeth and says:

Question by John P. Bruce: Where do you live, and how long have you resided there, and your age?

Answer. I have resided in De Kalb county about twenty months, and the State of Missouri about seven years; am about 30 years old.

Question. What is your profession?

Answer. I am a practicing lawyer.

Question. Did you attend the election held on the 4th day of November, 1862? and if so, state what occurred at the place you attended.

Answer. I was at Stewartsville at the said election, and in the evening went towards the voting place with the intention, and a ticket, to vote for John P. Bruce; before the door of the house where the election was held two members of the enrolled militia were posted, with sabres and pistols, apparently guarding the door; they were acquaintances of mine, to wit, Samuel Chenowith and Robert Ellis. So soon as they saw me coming to the door they remarked there comes one of the "Bruce men," and said to me that I could not vote then at these polls for John P. Bruce for Congress. I commenced reasoning with them; and insisting upon my right to vote, I told them they were acting out of their sphere of duty; they replied that it was no use to talk about it—I could not vote; not that they had any objection to me; that they knew how I was going to vote, and that was enough. I found it was useless to persist, as I was unwilling to force a passage through a guard who had sabres and pistols. I should have voted for John P. Bruce for Congress if I had been allowed to get to the polls.

Question. Did you hear of any difficulty, previous to your going to the polls, on the part of those who desired to vote for John P. Bruce, in their getting to vote?

Answer. *There seemed to be a general understanding that unless a man voted for Loan there would be some trouble in getting to vote.*

Andrew J. Coy testifies as follows, (page 137:)

I attended the election at Stewartsville for Congress in 1862. I was near the polls on the day of election, and intended to vote, but saw Captain McDonald, of the enrolled militia, and some 15 or 20 of his men engaged in preventing men from voting. I understood Captain McDonald to say that men could not vote there unless they voted the way he wanted them to. Captain McDonald was the commander of the post, and he was for Benjamin Loan for Congres, and engaged in preventing men from voting for John P. Bruce for Congress. I intended to vote for Bruce, but from what I saw how others were refused the privilege of voting for John P. Bruce, I concluded it was no use for me to try to vote.

Question. Did you vote at the late election for supreme judges in 1863?

Answer. Yes, sir.

Question. How was the election in November, 1863, conducted?

Answer. Very well; there was no difficulty in voting; the same men that were refused in 1862 voted in 1863 without any trouble or objection.

No testimony was produced before the committee relative to any interference in De Kalb county, except the foregoing.

There were three candidates for Congress in the seventh congressional district—John P. Bruce, Harrison B. Branch, and Benjamin F. Loan. The majority of General Loan over Mr. Bruce was 2,028.

The following tables are appended to illustrate the relative vote these gentlemen received in the counties where there is not alleged to have been any interference, as compared with those where interference is proved to have occurred. Exclude the counties where there were interferences proved, (except Livingston, where the interference was all against Bruce,) and count only the counties where there was a fair election, and the vote is as follows:

Counties.	1862.		
	Bruce.	Branch.	Loan.
Daviess	357	190	454
Gentry	429	27	306
Grundy	249	407	248
Harrison	481	687	208
Mercer	328	363	324
Putnam	247	419	40
Sullivan	503	303	116
Worth	169	16	217
Livingston	376	127	179
	3,139	2,539	2,092

Bruce	3,139
Loan	2,092
Bruce's majority	1,047
Branch	2,539
Loan	2,092
Branch's majority	447

(See printed testimony, page 147.)

Exclude the counties where there were interferences proved, (except Livingston, where the interference was all against Bruce,) and count only the counties where was a fair election, the vote is as follows between Bruce and Loan:

	1862.	
	Bruce.	Loan.
Daviess	357	454
Gentry	429	306
Grundy	249	248
Harrison	481	208
Mercer	328	324
Putnam	247	40
Sullivan	503	116
Worth	169	217
Livingston	376	179
	3,139	2,092

Bruce's vote	3,139
Loan's vote	2,092
Bruce's majority	1,047

(See page 147, printed testimony.)

Exclude the counties where there were irregularities proved, and count only the counties where there was a fair election, the vote is as follows:

	1862.		
	Bruce.	Branch.	Loan.
Daviess	357	190	454
Gentry	429	27	363
Grundy	249	407	248
Harrison	481	687	208
Mercer	328	363	324
Putnam	247	419	40
Sullivan	503	303	116
Worth	169	16	217
	2,763	2,412	1,913

Bruce	2,763
Loan	1,913
Bruce over Loan	850
Branch	2,412
Loan	1,913
Branch over Loan	499

Exclude the counties where there were interferences proved, and count only the counties where there was a fair election, the vote between Loan and Bruce is as follows:

	1862.	
	Bruce.	Loan.
Daviess	357	454
Gentry	429	306
Grundy	249	248
Harrison	481	208
Mercer	328	324
Putnam	247	40
Sullivan	503	116
Worth	169	217
	2,763	1,913

Bruce	2,763
Loan	1,913
Bruce's majority	850
The vote for President in 1860 in this district was	21,938
The vote for congressmen in 1862 in this district was	13,803
A falling off of	8,135
The vote in 1863 in this district was for judges	16,229
The vote in 1862 was for congressmen	13,803
An increase in 1863 of	2,426

There is some evidence tending to show interference at the polls in 1863' (see pages 40 and 35.)

Every one who is acquainted with and appreciates the form of our government will concede that elections should be free from violence and intimidation, and that no one should be vested with the right to determine who are, and who are not, qualified voters, save those who are by law clothed with, and by law made responsible for, the proper performance of that duty.

The committee are aware that the right of the elective franchise is intended for and should be extended to those only who are the friends of the government.

There must, however, be some legally constituted tribunal to determine who are friendly and who are unfriendly to the government, and some test furnished such tribunal by the law by which such determination can be regularly and properly made. The moment it is conceded that any irresponsible body of men have the right to decide who are, and who are not, qualified voters, or are suffered by threats, violence, or intimidation of any kind to deter persons from the polls, that moment an election becomes a mockery. In the case of Missouri, although the State in many portions had been the theatre of strife and civil war—although some of its citizens had rebelled against the government, yet good order had been so far restored that the civil authorities had full sway, and the law had been, by State authority, adapted to the new condition of

things, so as to sift by a prescribed and proper oath those who were worthy from those who were unworthy, by their votes of choosing the officers who were to administer the civil government.

There was, in reality, nothing which should have prevented a full, free, and fair expression of opinion by every qualified voter. There was, in fact, no necessity, in the seventh congressional district, so far as any *disloyal* persons are concerned, of providing any force to protect or guard the sanctity of the ballot-box. The candidates are conceded to have been loyal persons. The constitution of the State and the oath prescribed by the convention were sufficient of themselves, when administered by the judges of elections, to preserve the purity of the ballot-box. The only danger that either the civil or military authorities seemed or had any occasion to apprehend was, as the Order No. 45 expresses it, that the election "would be an occasion when angry passion, excited by the war, might produce strife, and prevent the full expression of the popular will in the selection of officers." The order expressly says that the oath prescribed by the convention to be taken by every one as a condition precedent to the right to vote, and the heavy penalties fixed upon those who might take the oath falsely, were sufficient safeguards by themselves to keep unfaithful and disloyal persons from exercising power in the State. The order stated, furthermore, "that no person must be allowed to interfere with the freedom of those qualified to vote under the ordinance." General Order No. 33, issued in pursuance of Order No. 45, in the seventh congressional district, to the officers and soldiers of the militia of that district, expressly said, "*the military should bear in mind that they are not the judges of the qualifications of voters; that duty is devolved by law on the judges of the election.* If these officers either admit improper persons to vote, or exclude proper persons from voting, the statutes of the State provide an ample remedy. The militia will carefully abstain from all acts calculated to interfere with the freedom of election." It affords the committee pleasure to be able to say, that the evidence in this case nowhere discloses anything tending to show that any superior officer of either the State or federal government manifested any other than an earnest desire to secure a full expression of the popular will at this election, and that such expression should be freely given without intimidation or molestation. The judges, so far as appears, with one or two exceptions, conducted the elections with entire fairness, and there was nothing on the part of civilians to warrant or justify the interference of the militia. But the evidence does disclose ample proof that a portion of the militia in certain localities disregarded entirely the injunctions given them in the orders before mentioned, and in many instances, in violation of their duty as good citizens, and of the commands promulgated prior to the election by those orders to them as soldiers, assumed to determine who should and who should not vote, and for whom votes should be cast, and by threats, violence, and by various modes of intimidation, so far interfered with the election as, in the opinion of the committee, to render the election a nullity.

The minds of the voters in Missouri had not become as quiet as they were prior to the occurrences of the war, and the great agitation it had produced. The fears of the people were more easily excited and their passions were more readily aroused than prior to the commencement of the rebellion. Violence threatened or force used would, under such circumstances, naturally produce sudden and great excitement, and it would spread speedily through the community. In the civil commotion unwarranted arrests had been made, outrages committed, personal rights had been violated, and property plundered and destroyed, and the grievances of the people could not in such times be effectually redressed. This condition of the popular mind facilitated the spread of the threats made, and rendered them more effectual than they would have been in times of long peace and quiet. This condition of the people should be borne in mind when considering the probable effect the military interference had upon

the election in question. If due weight be given to these considerations when examining the testimony in this case, the committee have not any doubt they will lead the mind of the House to the same conclusion reached by the committee, after a full and patient hearing of and deliberation upon the allegations of the parties.

The committee recommend the passage of the following resolutions:

Resolved, That Benjamin F. Loan is not entitled to a seat in this house as a representative from the seventh congressional district of Missouri.

Resolved, That John P. Bruce is not entitled to a seat in this house as a representative from the seventh congressional district of Missouri.

All of which is respectfully submitted.

JOHN GANSON,
On behalf of the Committee.

MINORITY REPORT.

Mr. UPSON, from the Committee of Elections, submitted the following views of the minority:

The undersigned, a minority of the Committee of Elections, to whom was referred the memorial of John P. Bruce, contesting the right of the Hon. Benjamin F. Loan to a seat in the 38th Congress as a representative from the seventh district of Missouri, having considered the same and the evidence submitted in reference thereto, and finding themselves unable to concur in the conclusions set forth in the report of the majority, beg leave to submit the following report:

The seventh district in the State of Missouri is composed of the counties of Buchanan, Andrew, Holt, Atchison, Nodaway, Worth, Gentry, Harrison, Mercer, Grundy, Putnam, Sullivan, Livingston, Daviess, and De Kalb, being in all fifteen counties; and the election in contest was held on the 4th day of November, A. D. 1862, pursuant to an ordinance of the Missouri State convention, passed June 13, 1862. Most of the evidence and papers in the case will be found in Mis. Doc. No. 13, of the present session, and the ordinance above referred to is on page 57 of the same. The whole number of votes returned as cast at said election was 13,803, of which there were returned for Mr. Loan 6,582, for Mr. Bruce 4,554, for Mr. H. B. Branch 2,665, for Mr. S. A. Richardson 1, and for Mr. R. M. Stewart 1, making Mr. Loan's returned majority over Mr. Bruce 2,028 votes.

The grounds of contest, as set forth by contestant in his notice, are as follows, viz:

1st. For interference by portions of the armed militia of the State of Missouri with the polls, and the tearing up of poll-books, and the interference with voters at the polls by your friends, whereby persons desiring to vote for me were prevented and intimidated from voting and rudely driven from the polls; and by thus preventing persons who would have voted for me I lost, in the counties named below, the number of votes set opposite each county:

Buchanan county	800
Andrew county	400
Holt county	400
Atchison county	400
Nodaway county	300
De Kalb county	100
Daviess county	200
Livingston county	600
Making a total of	3,200

which would have elected me over you, and made my entire vote 7,754.

2d. Improper interference and improper conduct of officers of the election in excluding qualified voters from [illegible] me in the counties named in reason 1st.

3d. Intimidatio[illegible] portions of the militia of the State of Missouri and other [illegible]y, [illegible]g voters from attending the election, who would have

4th. Interference of portions of the militia of Missouri by forcibly driving voters from the polls who had tickets in their hands ready to vote for me.

5th. Interference of portions of the militia of Missouri, in standing at voting places, with muskets in their hands, and demanding the tickets of voters; and when shown with my name on them, the tickets were torn up by your friends, and the parties told that they could not vote that ticket; and persons who were legal voters were thus prevented from voting for me.

Some other allegations are contained in contestant's notice, but as they are not insisted upon now by him, and as no evidence has been taken in support of them, it is not necessary to notice them further.

The respondent, the sitting member, in his answer, not only denies all these various allegations of the contestant, but also reserves to himself all benefit and advantage of objection to the said notice of the contestant; and on the hearing before the committee he insisted upon his objection to said notice that it did not specify with sufficient particularity the grounds upon which the contestant relies.

The statements contained in the notice of the contestant are very vague and indefinite; the election precincts, or the townships where the alleged irregularities and improper interferences took place, are not specified; the names of the persons who were interfered with or prevented from voting, or were intimidated from attending the election and voting, are in no case given; the military, or persons interfering with or preventing electors from voting, are not pointed out; and, generally, the statements lack that definiteness and precision essential in pleading, and which are necessary to inform a party what he is called upon to answer, where the alleged irregularities or improper interferences are claimed to have taken place, and what he must be prepared with evidence to meet and establish or refute.

The objection is also predicated upon the statute of 1851; and the law in such cases is ably commented upon, and decisions referred to, in the case of Kline *vs.* Verree, decided during the second session of the last Congress.

The undersigned submit that, on this ground, all evidence to support such allegations might properly be rejected, and the case be dismissed without further investigation; and it will also be seen that the respondent has not deemed it necessary, under the circumstances, to take any testimony on his behalf in this case.

But the undersigned, while holding this opinion, have, nevertheless, thought proper to go over the whole ground covered by the contestant in his testimony, and to lay before the House their conclusions on the facts which therein appear, so far as applicable to this contest.

All the evidence taken is that of the contestant, and he has seen fit to offer no testimony as to the election in Daviess, Holt, and Nodaway counties, three of the counties named in his notice; and there are also seven other counties in the district which are not named in the notice and concerning the election, in which no testimony has been taken, making ten of the fifteen counties composing the district in which the election is not questioned; and all letters of persons, the friends and agents of contestant, in regard to any of those counties which irregularly appear in the printed case hereinbefore referred to, (Mis. Doc. No. 13,) were objected to by the respondent when offered on the hearing, and not being competent testimony, even if they contained anything material to the issue, are not to be considered or received as evidence in the case, as is also the case with the *ex parte* deposition of George D. Tolle. The five counties to which the evidence relates are those of Atchison, Livingston, Andrew, De Kalb, and Buchanan, and it has been thought best to consider the evidence applicable to each county separately. But before doing this, it may be well to notice briefly some proceedings having reference to this election which had taken place in this State preparatory to the holding of the same.

The condition of Missouri, and the events transpiring there, from the breaking out of the rebellion up to the time of the holding of this election, are now mat-

ters of history, of which this house will take notice and will consider in examining and weighing the evidence in this case, and in coming to a final conclusion thereon.

It is sufficient here to remark, that many of her citizens at the first openly espoused the cause of the rebellion, and for a time the loyal citizens, aided by the federal forces, had to maintain a fierce, bloody, and devastating struggle on her soil with rebels in arms, in order to assert and maintain the supremacy of the Union and the loyal State organization; but at the time of holding this election the Union forces had driven out the rebel armies into the State of Arkansas. The State convention of Missouri, which has been called and chosen for this emergency, recognizing the fact that disloyal men were to be found in the State who were not entitled to the rights and privileges of electors, and that it was necessary and proper to distinguish between loyal and disloyal citizens in the exercise of the elective franchise, prescribed by ordinance, prior to the election, as an additional qualification for an elector, the taking of a certain oath to test his loyalty before he should be permitted to vote, (the form of which oath will be found in Mis. Doc. No. 13, on page 57,) and with, perhaps, an excess of clemency or liberality in this respect, allowed all citizens who would take said oath, and who would therein swear that they had not since the 17th day of December, 1861, wilfully taken up arms or levied war against the United States or against the provisional government of the State of Missouri, to vote, even though prior to that date they had taken up arms and been engaged in waging war in open rebellion against the national and State governments.

By General Order No. 24, issued by General Schofield August 4, 1862, (page 62, Mis. Doc. No. 13,) all the loyal men of Missouri, subject to military duty, were required to be organized into companies, regiments, and brigades, and all disloyal men and those who had at any time been rebel sympathizers were ordered to report themselves and be enrolled as such and to surrender their arms, and were to be permitted to remain at home so long as they should quietly attend to their ordinary and legitimate business, and not in any way give aid or comfort to the enemy, and were not to be organized into companies nor required or permitted to do duty in the Missouri militia.

Also, by Order 45 of the commander-in-chief of the State of Missouri, Governor Gamble, dated at St. Louis, October 23, 1862, (which order was read in evidence before the committee, but is not printed in the case, but will be found in Mis. Doc. No. 16, page 183,) certain rules and regulations were prescribed for holding the election and providing for protecting the polls by the military authorities wherever it might be deemed necessary, and the convention oath is referred to therein, and all electors otherwise legally qualified, who would take such oath, were to be permitted to vote, and punishment was provided in case of any improper interference by persons in the military service. Brigadier General W. P. Hall, commander of the 7th military district, by Order No. 33, issued at St. Joseph, in this district, November 1, 1862, (Mis. Doc. No. 13, page 141,) called special attention to said Order No. 45 of Governor Gamble, in reference to the election and to the necessity and propriety of observing its requirements.

Of none of these orders does the contestant complain, but before the committee we understood him to express his entire approval of them.

With this brief reference to the actual condition of things in Missouri at the time of holding the election in contest, we will proceed to examine the testimony taken by contestant as to the election in five of the fifteen counties composing the district, and will consider the evidence relating to each county separately.

ATCHISON COUNTY.

The only testimony offered in regard to the election in Atchison county is the deposition of Silas Puryear, and that applies only to one election precinct in said county, which was at Rockport. This witness, by his own showing, did not

attend at the polls of any precinct, although he states that he was in Rockport on the day of election, and saw a military guard at the door of the court-house where the election appears to have been held, but he did not go to the court-house.

He says there were a good many men in town who did not attempt to get in to vote, himself among the rest, after seeing how things were conducted, but he does not state how the election was conducted, and it appears he did not go to see. He has a good deal to say about what he heard others remark, and about what some person told him in regard to the matter, both before and on the day of election, all of which is incompetent and inadmissible as evidence, and is consequently of no importance.

We are left to infer that the virtuous indignation of the witness, and that of his fellows, was excited at sight of the military guard stationed at the door of the court-house to protect the polls and to enable the loyal citizens peaceably and quietly to exercise the elective franchise, and hence he and they would not attempt to vote, though no one had offered to interfere with or hinder them in going to the ballot-box and depositing their votes. The sight of a loyal soldier was displeasing in their eyes, and his presence they would not tolerate. Nevertheless, this witness, at this sight, and on the strength of what he says he heard others say, and of rumors he had heard in circulation, is induced to give it as his *opinion* that in the county of Atchison there were from 250 to 300 voters who were prevented from voting for the contestant by the interference of the militia at said election; and this is claimed by the contestant to be competent evidence for him in the case, though the witness never attended the polls on said day at any election precinct in the county, and had no knowledge himself of any interference whatever by the militia at said election. The witness had also been employed by contestant as his counsel to take depositions for him in this very matter. Comment on such testimony is unnecessary, nor is it worthy a moment's serious consideration. Yet contestant in his notice claimed that he lost in this county 400 votes. The evidence wholly fails to support the charge, and is also restricted to one precinct in the county.

LIVINGSTON COUNTY.

In regard to the election in Livingston county, the deposition of six witnesses is taken. Five of them testify only as to the election at one of the precincts in Chillicothe township, in said county, viz: James Hutchinson, Thomas R. Bryon, John Garr, senior, Jacob L. Myers, and John W. Garr; and the other witness, Robert Bruce, testifies only as to the election at the precinct in Greene township, and thus the whole of the evidence relates only to two election precincts in the county.

It appears by the testimony of the witnesses as to one of the precincts in the township of Chillicothe that a squad of Missouri militia, commanded by a Lieutenant Colonel Jacobson, had some little difficulty or disagreement on the morning of the election with the said witness, Hutchinson, and also with the judges of election, in relation to allowing disloyal men to vote, it being alleged that he, Hutchinson, was disloyal, and for a short time the judges refused to go on with the election at that precinct, and one of Jacobson's men led Hutchinson out of the house.

Governor Gamble, however, on being telegraphed to on the matter, sent an order to Jacobson, and he at once withdrew with his soldiers from the place, and voting was resumed again and continued during the day, and, so far as appears, was wholly undisturbed.

The whole interruption did not exceed one hour, and only one man, the witness Hutchinson, is shown to have been interfered with, and he testifies that he afterwards voted for the contestant that day at that precinct; so that, in fact, no person

is shown to have been prevented from voting for contestant at that precinct. The disloyal nature of the witnesses is well illustrated in the testimony of John W. Garr, (Mis. Doc. No. 13, page 111,) who was interrogated by respondent's counsel on cross-examination as follows:

Question. Have you ever been a member of the militia of this county; and if not, for what reason?

Answer. I have not. I got a certificate of exemption as a sympathizer with the rebellion.

On being re-examined by the contestant to show that the loyalty of the witness was, nevertheless, perfectly sound, he was further questioned, and answered as follows, viz:

Question. Have you not always been for the Constitution as it is and the Union as it was, and a friend of the government?

Answer. I have always been a constitutional Union man, in favor of the old Constitution.

It is thus shown, by sworn testimony taken by contestant in this case, that a sympathizer with the rebellion in the State of Missouri was in one case a "constitutional Union man, in favor of the old Constitution;" and we may therefore conclude that this witness considered the rebellion as perfectly constitutional. We are not at all surprised, therefore, to find this witness ingeniously swearing, (on page 110,) in reply to an inquiry by contestant as to how many persons were prevented from voting on the day of election in Livingston county, that "judging from former elections, there must have been some four or five hundred short." This witness only attended at one of the two election precincts at Chillicothe, but is willing to swear thus hypothetically and in round numbers for the whole county, without being able to name a single person in the county who was prevented from voting, much less from voting for contestant.

The other witness, Bruce, who testifies in regard to this county, was only at Utica precinct, in Greene township.

He testifies to a difficulty or dispute between the judges of election and a squad of soldiers, under Major Howe, who came over in the morning to guard the polls, and that the judges thereupon declined to open the polls and go on with the election, although the major insisted they should. His evidence, however, shows that the polls were finally opened, and the election proceeded with, and that the soldiers did not attempt to interfere with the election after the polls were opened, and that they remained after that only a few moments, having been ordered back to Chillicothe.

No one is shown to have been interfered with or prevented from voting at this precinct. No evidence is given in regard to the election at any other precinct in said county, although it appears by the testimony of John W. Garr, aforesaid, (page 110,) that there were some seven election precincts in the county.

There is, therefore, no testimony of any interference with the election by the military or other persons in said county of Livingston to invalidate in the least the election, or to change the relative vote of the parties.

The contestant, in his notice, claimed a loss of votes in his favor, in this county, of some six hundred. His evidence wholly fails to establish any part of this claim. It is, however, worthy of remark, as shown by the official canvass of votes, on page 147, that in this county of Livingston, where contestant thus attempts to show military interference to his prejudice, his majority is 197 votes, and his aggregate vote is more than twice that received by the respondent, his opponent, which fact is conclusive against the charge of military interference there to the prejudice of the contestant.

ANDREW COUNTY.

Six witnesses, viz: J. R. Watts, Hamilton Smith, Robert Elliott, G. W. Samuel, Jacob Hittibidal, and Joseph Nickel, testify as to the election in Andrew county; but they all testify in regard to but one election precinct in said county, which precinct was at Savannah.

As to what took place at all the other election precincts in the county the witnesses know nothing.

Watts, who was one of the judges of election there, states, in substance, that all the interference with voters there was with a crowd that was outside of the window where the votes were received, but that he heard neither before nor at the election any threats against voters who wanted to vote for contestant, nor did he see any persons endeavoring to prevent men from voting for John P. Bruce; says that at that precinct it is always the custom, on election days, for large crowds to gather around the place of voting; he also states that the board decided that every qualified voter who would take the oath prescribed by the convention should be allowed to vote.

Smith testifies that there was a crowd around the window keeping up a continual noise and confusion, and saying that they would not allow secessionists to vote. He says that a Mr. Hosford, in trying to get to the window to vote, had some one stamp on his foot, and was crowded away from the polls; as was also a Mr. McCrury. Hosford was going to vote for contestant, but the witness did not know what ticket McCrury had. These were all the persons he saw prevented from voting, and he knew of no person but Hosford who was prevented from voting that day for contestant. He states that all the loyal men in Andrew county, between the proper ages, were enrolled as State militia, and the militiamen whom he saw about the election that day were off duty and acting as citizens.

Elliott, an old man of seventy years, says that he was unable to get to the polls on account of the crowd and on account of being lame in his hand and shoulder; that, on trying the second time, a man named Stockweather met him and told him he could not vote, and that after trying a while ineffectually to get to the polls, he finally left without voting, and that he should have voted for contestant. Says he talked some with others there who made a proposition to go to other precincts in the county and vote, and that Judge Carth told him that there was perfect order at the precinct near him, which was about six miles from Savannah. He also states that there is generally a crowd around the voting place at Savannah at all general elections, and that he knew of no one besides himself that was prevented from voting at said election for contestant; nor did he know whether the man Stockweather, who told him he could not vote, was a friend to the election of Bruce or Loan.

Samuel states that he was at the election and voted without any difficulty in getting to the polls, except that it was very much crowded around the polls. During the day he says he saw persons prevented from going to the polls who attempted to vote, and it was by men who were crowding around the polls and crowding out persons who came up to vote. The crowd was composed of both citizens and men who belonged to the State militia, as he judged from their caps. Thinks many of those who failed to vote would have voted for contestant from what he heard them say during the day.

In reply to a question put to him by contestant, as to his opinion how much larger contestant's vote would have been if there had been no intimidation or interference at said election, and there had been *a full vote of all who desired to vote*, he coolly states that he thinks it would have been four hundred larger, (referring probably to the county,) but he gives no other data on which that opinion is founded.

On cross-examination he admits that it is usual at an election at Savannah for the polls to be crowded both by persons who have and by persons who have not voted, and that often voters are detained for a long time before they can make their way through the crowd, particularly when there is a close or exciting race between candidates.

Thinks he recognized two persons, named Murphy and Mason, who failed to vote, and he also thinks two others, but is not certain. Does not know of his own knowledge that any persons were prevented from voting for contestant at

that election; nor does he of his own personal knowledge know of any person that did not vote at said election. He, himself, voted for contestant.

Hittidibal states that he tried twice to vote, but was threatened and prevented and crowded back by a stranger in the crowd from voting, although the judges tried to have him vote.

Says there were some men in the crowd whom, from their dress and uniform, he judged belonged to the State militia; but admits, on cross-examination, that numbers of the enrolled militia were in the habit of wearing every day, when not on duty, clothing that had been furnished them as militiamen.

He also admits that he saw no one except himself prevented from voting for contestant.

Nickel says that at Savannah precinct he saw interference with men who were attempting to vote; that he saw at different times men attempting to vote pushed back from the polls and prevented from voting, and that the conduct of the crowd around the polls was boisterous and appeared to be dangerous. On being asked for his *opinion*, (or guess,) he answers that, in his *opinion*, in the neighborhood of two hundred at the Savannah precinct were prevented from voting; but on his cross-examination, he says he does not know how many would have voted for Bruce.

He also states that the militia present at the polls that day were not on duty, but were there as other citizens, and that he has frequently, at the election precinct in Savannah on general election days, seen large crowds around the polls of men who had and who had not voted, and of those who did not desire to vote, and has seen considerable difficulty in voters getting up to the polls to vote. He further states it as his understanding that the judges of election at Savannah precinct allowed every person to vote who was otherwise qualified, and who agreed to take the oath prescribed by the convention ordinance, and that he has heard some who did not come to the election allege that they would not take an oath unknown to the Constitution and laws of the country, and therefore would not come to the election.

This action on the part of disloyal men the undersigned think is a very poor reason for invalidating the election, but a strong one for upholding the action of the loyal men who did vote.

This testimony, and also the last question put to this witness on his cross-examination and his answer to the same, illustrates strikingly the kind and class of men who sympathized with the contestant, and who complain most bitterly about the result of this election. It is as follows:

Question. Does not the class of men who you think did not vote at said election and who you think would, on a fair election, have voted for John P. Bruce, consist mainly of men who had returned from the rebel army or had been arrested by military authority and imprisoned or put under bonds, or enrolled under order number twenty-four, or were reputed to be secessionists or secession sympathizers?

Answer. The men above referred to consist partly of men who uniformly call themselves democrats, and many of whom had been arrested and imprisoned by the military authorities at some time since 1860; partly of men who had at one time been in the State or confederate army, and some of whom are now under military bonds; and partly of those who are said to be enrolled under order number twenty-four. Of the last there were but few at Savannah, comparatively. All three of the above classes are, by the republican party, called rebels and rebel sympathizers.

Without stopping to inquire whether this class of persons is or is not, in the case presented, rightly named, and without further comment on the character or credibility of the witnesses, it is apparent on the face of the testimony that no military guard attended upon or was placed over the polls at Savannah on the day of election, but that the commanding officer of the militia at that place, Lieutenant Colonel Nash, expressed a willingness to protect the polls, if necessary, and if called upon to do so; but it seems that the judges of election did not consider there was, at any time, sufficient disturbance or interruption at the

ls by the crowd to demand any aid from the military, as no call appears to ve been made by them on that officer for any assistance.
No interference with the election by the military is shown, or by the officers the election, or any improper conduct on their part; and taking the most eral view of the testimony in favor of the contestant, less than a dozen per- s are shown to have been prevented or hindered by the crowd or press around polls from voting for him at Savannah; and the evidence that any one was ually prevented from voting for contestant by the friends of the respondent, by any one, is somewhat problematical, and no good cause is shown for in- idating the election at this precinct, much less for invalidating the election oughout the entire county. The claim of the contestant, that he lost 400 es in this county, or any considerable number, is not supported by his evi- ice.

DE KALB COUNTY.

The depositions taken in regard to the election in this county relate only to election precinct in the county, viz., the Stewartsville precinct. These de- itions purport to have been taken before two justices of the peace, but by at authority does not appear, and are taken wholly *ex parte*, no notice of the ing of the depositions before these magistrates appearing to have been given, l no one appearing for the respondent or cross-examining any of the witnesses. A notice, however, seems to have been served on respondent to take the testi- ny of these witnesses, at the time and place where taken, before one James Ferren, one of the circuit judges of the State of Missouri; but it is alleged t he did not appear, and the depositions were taken as above stated.
It is difficult to see how they can be admitted in evidence in this case, objec- n being taken to their competency and admissibility by the respondent.
The act of Congress of February 19, 1851, which makes provision for the ing of testimony in contested election cases, specifies in the third section reof, any judge of any court of the United States, or any chancellor, judge, justice of a court of record of any State, or any mayor, recorder, or intendent any town or city, residing within the congressional district in which the con- ted election was held, as the persons to whom application may be made the parties, and before whom evidence may be taken on giving the requisite ice; and the tenth section of said act provides for applying to and taking imony before any two justices of the peace, when no such judge or magis- e as is specified in section three is residing within such district, but not erwise. This fact of non-residence of the magistrate, named in section ee of the act, does not appear, but the reverse is apparent from the fact t the only notice given for taking testimony in this county names a judge the person before whom it is to be taken; and the other depositions in the se show that other judges resided in the district and acted in taking con- ant's testimony in other counties of the district, and the only excuse offered contestant on the hearing for taking the testimony before the two justices of peace was, that the judge named in the notice was afraid or was unwilling ct in the matter.
The depositions are manifestly illegal and inadmissible, and no evidence law- y appears as to the election in this county. But if the testimony thus taken *parte* were even admitted, it would fail to be of any essential benefit to the testant. It is confined wholly to the one precinct at Stewartsville, and it s not appear how many votes were polled at this precinct, nor how many ers attended there, or how many votes would have been cast if all qualified ers had voted, even admitting that any were prevented, as claimed by con- ant; nor does it appear how many votes were cast at this precinct for either he candidates; and even if it be admitted that there was some improper in-

terference at this precinct, (though the evidence, if admitted, is far from being satisfactory or conclusive on this point,) all that can be claimed from the evidence for the contestant is the number of votes, if any, actually shown to have been prevented from being cast for him, and not an estimated number predicated on an opinion or guess.

The evidence is wholly *ex parte*, and the witnesses are partisan supporters of the contestant, and give what color they choose to their statements as against the respondent, who has no benefit of any cross-examination to sift their evidence and show their particular bias and secession sympathies.

Gibson, Crews, Boaz, and Rose, four of the seven witnesses called, did not go to the polls to vote till in the evening, as they all state; and Atterbury, another of the witnesses, was only at the polls when Rose was there; and, consequently, those five witnesses could not know how the election was conducted during the day. Not a dozen persons are actually shown to have been hindered or prevented from voting on the face of this testimony, and this is the only precinct in the county referred to in the testimony of all the seven witnesses.

BUCHANAN COUNTY.

All the testimony taken in regard to the election in this county is as to the election in St. Joseph, in Washington township.

This township, which includes the city of St. Joseph, had six voting precincts, viz: at Allen house, at Nunning's brewery, at the market-house, at court-house, at Potter house, and at Harness house.

No testimony is given as to the manner of conducting the election at the Harness house or the Potter house.

Only one witness, O. M. Loomis, (Mis. Doc. No. 13, page 9,) testifies anything about the election at Nunning's brewery, and his testimony only shows that he voted for contestant there, but does not show that any of contestant's friends were prevented from voting there by any one.

E. J. Knapp (page 6) and S. Ensworth (page 12) are the only witnesses who testify about the election at the Allen house, and they do not show that any voters there were prevented from voting for contestant by either violence, threats, or intimidation.

Cowie, the person claimed to have been assailed, was assaulted after he had voted, and by an unarmed man, for what reason does not appear; and it was also in the latter part of the day.

McKesson, another person referred to, had not offered to vote; and the kind of tickets he had does not appear, nor is it shown for whom he was electioneering.

The witness Ensworth (page 15) expressly negatives any violence, threats, or intimidation that day, at that precinct, against voters for contestant.

At the court-house, the evidence shows the election stopped and poll-books destroyed, after about one hundred votes had been polled. This was done not by the military guard, but by a squad of citizens, some of whom wore uniforms of the State militia, but evidently not soldiers on duty that day, or under the charge of any officers. Whilst this violence is not to be justified, it is proper to notice, in a legal point of view as to the effect of this conduct, that the second board of judges of election, acting at the time, were chosen without authority of law, and that, in fact, neither the first nor second board of judges of election at the court-house, nor the clerks, had taken the oath required by the constitutional convention, and therefore they were not legally authorized to preside at the election, or to receive or count the votes, and no voting was legally had, or could be had, at that precinct, up to the time that voting actually was stopped.

Besides, the evidence and the laws of Missouri, which were produced before the committee, showed that voters in the township of Washington (which included the city of St. Joseph) could and did vote for representative in Congress

at any of the other precincts they saw fit; so that, if the polls at the court-house had been unlawfully closed, the voters would not have been prevented from casting their votes for contestant at any of the other election precincts, which all remained open during the day, so far as the evidence shows.

At the market-house, the witness (Knapp) testifies he saw only one man (Howard) prevented from voting, whom he knew and could name, although he claimed, on his direct examination, that he saw a number of persons prevented from voting there by the enrolled militia.

The time he says he saw Howard prevented from voting was in the afternoon, and he did not know what kind of a ticket he had, nor whether he was a friend to contestant or respondent.

O. M. Loomis testifies that he was taken out of the market-house by three of the enrolled militia, (he does not say soldiers on duty there,) but that he afterwards voted at Nunning's brewery.

It appears by his own testimony that, before he was carried out, he got into an altercation at the market-house with a Mr. Arnold and called him a liar, which is probably the explanation of his sudden exodus from the polls there. Samuel Ensworth testifies to seeing a man in uniform, at the head of the stairs at the market-house, ask for, and as it was handed to him take, a ticket from an old man named Langston, tear it up and drive Langston down; but it does not appear whether Langston was intending to vote, nor for whom he would have voted, nor whose name was on the ticket. He further testifies that he did not hear contestant's name mentioned in the crowd at the market-house, and that he did not see any one turned off at the polls. He also testifies that the military guard placed there, and at the other precincts, was so placed there by General Hall at the request of contestant. Ensworth, it appears, was also a candidate for sheriff at this election, in opposition to the unconditional Union ticket.

John Fox, one of the judges of election, testifies that a crowd came in at the market-house, about 11 o'clock in the morning, saying they meant to stop the voting there, and commenced pushing the people about the room, and some one of the crowd took hold of a Dr. Lamme and pushed him about, and finally they got him out; but he afterwards says he could not say whether Lamme, after he was seized, was put out, or got out of his own accord. In the confusion the judges stopped the voting about half an hour, and then resumed it. Says that he did not know or hear that any of Bruce or Loan's friends interfered to prevent any one from voting, or attempted to stop the election.

John Scott, who acted as counsel for contestant, ingeniously testifies that, having voted in the forenoon unmolested, he in the afternoon was informed that the military were interfering at the market-house, and he went there, and says the soldiers, without arms except side-arms, were there in considerable numbers, preventing any one from approaching the polls except such as they were satisfied would vote the ticket called unconditional Union ticket, on which, he adds, was the name of Benjamin F. Loan for Congress.

He further says, if a man insisted on voting the Union ticket on which was the name of contestant for Congress, he was forcibly ejected from the room, and, in some instances, kicked down stairs, and otherwise abused. He specifies no names, nor any number of persons, and his testimony is too indefinite and uncertain to have any material influence in the case, and savors too much of the partisan, and also of an attorney testifying for his client.

A. M. Saxton merely testifies that, as he and some five others were about to vote at the market-house, some soldiers arrested two of the six, and he left without voting. He does not say why he so left, nor for whom he or the others intended to vote, nor why the two were arrested.

B. C. Cunningham, a witness, by his own evidence and admission a rebel sympathizer, testifies that he went to the market-house to vote for contestant,

but was prevented by persons dressed in the garb of soldiers; that he went back the second time to vote, and was arrested and taken to the guard-house, but was released after a few moments, and after that he did not attempt any more to vote.

J. J. Abell testifies that he went to the market-house and voted, and that he was then arrested and taken to the guard-house, but was released by General Hall soon after.

He admits that he was enrolled on the disloyal list, under Order No. 24, and that he was a brother-in-law of General M. Jeff. Thompson, of the rebel army.

S. S. McGibbon attended at the market-house about an hour and voted, and says that everything went on peaceably while he was there, except the arrest of a number of men who were said to be Order No. 24 men, one of whom he says was not. These men, it is shown, were all soon after discharged that same day, and it does not, for certainty, appear for what they were arrested.

Dr. A. Lamme testifies that he was at the market-house, and remained about an hour, unable to vote on account of the crowd, about a dozen others being sworn with him, and that a squad of soldiers came in as he was preparing to vote, and commenced ordering and putting out voters, and stopped the voting for a time, and that three men in uniform took hold of him and put him out of the house, and that he intended to vote for contestant.

To show this man's loyalty, it is sufficient to state that, on his cross-examination, he admits that, in the summer or fall of 1861, at the time the United States flag was raised over the post office building in the city of St. Joseph by federal soldiers, he did propose and give three groans for the man who put up said flag on said building.

The contestant, on the re-examination of this witness, to palliate somewhat this conduct, induces the witness to testify that the common council of the city had, prior to this, so far shown the impartiality of their loyalty as to pass an ordinance "against the raising of any flags, United States or secesh," which simply shows that said common council, in that respect, treated the rebel flag as entitled to equal consideration with the United States flag, and evidences that their loyalty, like that of the witness, was not above suspicion.

The only other witness sworn is D. J. Heaton, and he does not state at what precinct he attended. He only speaks of what others told him, and says that he became disgusted at the way the election was conducted, and went home and did not vote, though he was told by the persons at the election that he could vote. By his own statement, no one prevented him, but he voluntarily declined to vote, and of this neither he nor contestant can rightfully complain.

The evidence as to the election at the market-house shows that less than a half-dozen men (Howard, Langston, Lamme, Saxton, and Cunningham) were actually prevented from voting, if it indeed shows that any one man was actually so prevented, and several of those who say they did not vote seem to have acted voluntarily in the matter, claiming that they thought it useless to vote, or inconvenient or hazardous to attempt to vote; and this opinion, it is apparent from their testimony, was suggested as much or more by a consciousness of disloyalty and of guilt on their part than by any real ground of danger from the military, in quietly exercising the elective franchise. That the military or the crowd did not prevent the electors from voting at this precinct for contestant is conclusively shown by the fact, that at the market-house precinct the contestant received about one-third of the whole number of votes polled. (See page 51, Mis. Doc. 13.)

Disloyal men would readily attribute their defeat at the ballot-box to the presence of a loyal military guard stationed there to protect the polls and to permit the loyal citizens to hold an election, and would eagerly seize upon this pretext to invalidate the election by alleging military interference and intimidation. James A. Matney, one of the contestant's witnesses as to the election at

St. Joseph, expressly states, as his impression, that of that class of men who were generally denominated returned rebels, and men who had been arrested, taken the oath, and given bond, and those who had returned from Price's army and voluntarily surrendered themselves, and those enrolled under Order No. 24 as rebel sympathizers, a majority of this class that did vote, voted for contestant. (Mis. Doc. No. 13, page 31.)

We have, also, heretofore noticed, in referring to the testimony, several of the witnesses identifying themselves as belonging to this class of disloyal citizens. Such men would very naturally complain of the presence of a military guard at the polls, and would gladly invalidate and make void an election where the successful candidate was not the one of their choice, and the binding obligation of the oath, under which they testify, would be as little regarded as are their oaths of allegiance.

The military guards that were stationed around the various election precincts in Washington township were so stationed at the request of contestant, and neither he nor his friends have any right to complain of their presence there, nor to question its legality, much less to urge it as a reason for not voting.

The sight of a Union soldier guarding the polls would afford no just ground of alarm to a loyal citizen, much less excite his indignation. The State militia was wholly composed of, and formed a part of, the loyal citizens of the State, and had a common interest with him in preserving the purity and freedom of the ballot-box.

The undersigned see in the evidence no proof of interference or disturbance at the polls at the market-house sufficient to make void the election; but if the contestant were allowed the full benefit of all the votes which his witnesses, in estimating or guessing, claim for him in this entire township of Washington, it will be seen that it will be of no avail to him in affecting the result of the election.

Only two of his witnesses estimate his losses in this township. Knapp, on pages 7 and 9, puts the number of persons who, in his opinion, were prevented from voting, or did not vote, in Washington township, at about 300. Matney, on page 24, estimates the whole number who were prevented from voting in Washington township at from 150 to 200 voters. The witnesses do not say that all these would have voted for contestant; but counting them all in his favor, and at the highest number of 300, including those votes destroyed at the court-house, and it gives all the ground covered by the witnesses in Buchanan county, as this is the only township in the county at which any of them attended the polls on the day of election, or of which they had any knowledge in regard to the manner in which the election was conducted. Speculations or guesses of witnesses as to election precincts which they did not attend, whether in this or in other counties, it will not be seriously urged should be received or considered in determining that contest.

The majority for Loan, the sitting member, over the contestant, as shown by official returns, page 147, is 2,028. Deduct from this the aggregate of 300 votes claimed for contestant by his witnesses in Washington township, as above stated, and it still leaves Loan's majority 1,728, which it is impossible for contestant to overcome by any fair deductions from his evidence, which only relates to five other election precincts in the entire congressional district. It would require over three hundred additional votes for contestant at each of these other five precincts to do away with the majority still remaining to the sitting member—a number in each case to which no political arithmetic can show him to be entitled. In addition to this fact, it may be added that the number of 2,665 votes cast at this same election for Mr. H. B. Branch, another candidate of the radicals in this district, shows pretty conclusively that the contestant is far from being entitled to claim that he is the choice either of a majority or a plurality of the voters in said district.

In glancing at the testimony it has not been thought necessary or proper to notice, to any considerable extent, hearsay statements, or vague rumors, or irrelevant and immaterial evidence, as against the rights of the sitting member. The inferences, impressions, conclusions, guesses, and opinions of witnesses are often improperly given in the testimony, and many times when the witness has no actual knowledge of the facts concerning which he assumes thus to speak. Such evidence it is unnecessary to comment upon. In weighing the testimony it should be borne in mind that the only witnesses sworn are those selected by the contestant—many of them his partisan supporters, some of them his counsel, and quite a number of them confessedly disloyal or in sympathy with rebels. In saying this it is not intended in the least to question the loyalty of the contestant. It should also be borne in mind that at the time this election was held all loyal citizens of Missouri liable to do military duty were in the enrolled militia, and a large portion of them were uniformed, and consequently a large proportion of the voters necessarily belonged to and composed a part of said militia, and more or less of them would be found with other citizens at the polls, clad in the military uniform, as is shown by the testimony. For the same reason, candidates for the various elective offices would be to a greater or less degree taken from this class of voters.

No complaint is made by the contestant, either in his notice or in his evidence, of any military or other interference by federal officers or soldiers, nor of any action or interference on the part of the general government. Neither is any complaint made of the action of the officers of election; and, so far as appears, they acted in every instance with fairness and impartiality. The whole burden of the contestant's allegations and testimony, so far as relied upon by him, is directed against the action of some of the enrolled militia and their officers and some other persons at and around the polls at the precincts testified about.

It was claimed in substance by the contestant before the committee that rumors were in circulation prior to and on the day of the election that if men enrolled under Order No. 24 should vote, they would be arrested, or would be made to serve in the enrolled militia; and he insisted that many men who would otherwise have attended the polls and voted for him were thereby intimidated and deterred from so doing.

The evidence, even if admissible, (which is questioned,) does not sustain this position, nor is it specified in contestant's notice as a ground of contest; but it may be added that, so far as regards the rumor that the act of voting would be considered by the authorities as an act or acknowledgment of loyalty, which would entitle the voter to be enrolled and to serve in the State militia, as a loyal citizen should, the undersigned can see no just ground of complaint on that account, if such rumor did exist; and the man who would, in consequence of such a rumor, refrain from voting, should be considered as justly disfranchised and as undeserving of sympathy.

It may also be suggested that if evidence of the existence of unauthorized rumors is to be received and acted upon in contested election cases, rumors of every kind will not be found wanting in any case where it is desired to defeat an election, and they may easily be originated and circulated for that express purpose.

It is also proper to notice that the aggregate vote for Congress in this district was larger than that of any congressional district in the State at this election; and it was alleged by the respondent on the hearing, and not disputed by contestant, that notwithstanding there were chosen at this same election county officers and members of the State legislature, the seat of none of those officers has ever been contested, and they have all exercised the functions of their respective offices without any question as to the validity of the election. It will also be noticed, as shown by the contestant's own evidence, (page 31,) that at the time the congressional canvass was going on in this district, and when

the election was held, the respondent was not within the district, but was absent on official duty in another part of the State, and had nothing whatever to do with any action taken at the polls.

It has also been noticed that there are fifteen counties in this district. Allow, as a sufficiently low average, ten election precincts to a county, and it gives 150 precincts in the district. The contestant claims to have offered testimony as to the manner of conducting the election at only eight of those precincts, but he asks the House to presume, without proof, that his allegations are true in regard to the elections at the remaining 142 precincts.

The presumption, however, in the absence of that proof, is, that the election in all of those precincts was held according to law, and that the return of votes cast was legally and correctly made. It is not the fault of the loyal citizens of Missouri that their State has been made the theatre of a bloody and devastating civil war, nor that guerillas have at times lurked about in their State, plundering and murdering her citizens; nor should those loyal men, after having successfully struggled against, overcome, and driven out traitors and rebels, be disfranchised on account of any disturbed state of society which might naturally result from these things, and from the presence in their midst of a few returned rebels and rebel sympathizers. That loyal voters should be somewhat excited and indignant at seeing men at the polls who had recently been imbruing their hands in the blood of their neighbors, and in destroying and plundering their property, or had given aid and comfort to those who had been thus engaged, is not surprising, nor that they should have then and there expressed some of their indignation towards and detestation of such men, in language not pleasing to a rebel ear.

Patriotism could do no less than this; and the undersigned not only justify the State authorities and the loyal citizens of Missouri in protecting the polls at some of the precincts by a guard of the enrolled militia, wherever they deemed it necessary under the circumstances, but also consider that, on the contestant's own showing, they acted on the whole, and with few exceptions, with the most patient forbearance towards this particular class of men, who on that occasion thus assumed to exercise the elective franchise.

The undersigned, finding the allegations of contestant unsupported by the facts, have not deemed it necessary to refer to precedents; but they would instance as cases where the facts were much stronger in favor of the positions taken by the contestant than they are in this case, and yet the election was held valid, the case of Trigg *vs.* Preston, Cl. & H., page 78, and the case of Andrew J. Clements, decided during the second session of the 37th Congress.

In the case last cited, the Committee of Elections, in their report upholding the election, use the following language: "The committee are also satisfied that on the day of election there was an armed rebel force present in this district, preventing or restraining the voters from the exercise of the elective franchise, and that though a violent and bitter public sentiment existed, calculated to overawe and intimidate, yet the rebel forces had not, up to that time, so taken possession of the district as to prevent such voters as chose to do so to deposit their votes for a representative in this Congress." Notwithstanding this state of things, the said committee, in their said report, which was approved by the House, came to the conclusion, upon the whole evidence, "that, on the day of election, no armed force prevented *any considerable number of voters*, in any part of said district, from going to the polls," and thereupon they sustained the validity of the election.

The undersigned trust that the presence, in a few of the precincts in this seventh district of Missouri, of a few loyal State troops, acting under the orders of the State authorities in guarding the polls, will not be considered more dangerous to the free exercise of the elective franchise than was in Tennessee the presence of rebels in arms.

Being fully convinced that no good reason is shown in the evidence for invalidating the election, and it satisfactorily appearing therein that the contestant is not entitled to a seat in this house, but that the sitting member is entitled to retain the seat which he now holds therein, and the contestant himself having, on the hearing before the committee, only insisted that the election in contest should be declared void, and the matter be referred back again to the people for a new election, a claim which is not even set up or alleged in contestant's notice, the undersigned therefore submit the following resolution:

Resolved, That Benjamin F. Loan is entitled to retain his seat in this house, as a representative in Congress from the seventh congressional district of Missouri.

CHAS. UPSON.
N. B. SMITHERS.
G. CLAY SMITH.
G. W. SCOFIELD.

The debate in the House upon this case proceeded upon the facts and principles asserted in the majority and minority reports. On the 10th of May, 1864, the House rejected the resolution reported by the majority of the committee and adopted the minority resolution. The vote stood—for the majority resolution 59, against it 71. Mr. Loan therefore retained his seat.

NOTE.— The debate will be found in vol. 52, pages 2156, 2157, 2185, 2194, 2196, 2207. Speeches for the report: Mr. Dawes, page 2166; Mr. Brown, page 2191; Mr. Bruce, page 2207. Against the report: Mr. Upson, page 2159; Mr. Smithers, page 2163; Mr. Eliot, page 2185; Mr. H. W. Davis, page 2188; Mr. Myers, page 2196; Mr. Loan, page 2211.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

BIRCH *vs.* KING, *of Missouri.*

PRICE *vs.* MCCLURG, *of Missouri.*

These cases were similar to the case of Bruce *vs.* Loan, of Missouri. After the House had refused to agree to the report of the committee in that case, the papers in the above-named cases were reported back to the House and laid upon the table. There were no written reports, nor was there a contest in the House.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

CHANDLER, *of Virginia.*

A large majority of the population of the district being within the military control of the rebel authorities, the election was treated as not valid.

IN THE HOUSE OF REPRESENTATIVES,

APRIL 25, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

That the second district of Virginia is composed of eleven counties, viz: Brunswick, Dinwiddie, Greenville, Isle of Wight, Nansemond, Norfolk, Princess Anne, Prince George, Southampton, Surry, and Sussex.

Mr. Chandler claims to have been elected on the fourth Thursday in May, 1863, the day fixed by law in the State of Virginia for the election of representatives to the present Congress. Polls were opened on that day in nine [redacted] in Norfolk county, Portsmouth, and Norfolk, and the whole number of

votes cast was 779, of which Mr. Chandler received 778. The committee have not been able to ascertain how many of these votes were cast at each of the several voting places, but have been informed that almost the entire vote was cast at the city of Norfolk. The conclusion to which the committee have arrived does not render it necessary to make certain this fact. No votes were cast or polls opened in any other county in the district, for the reason that all the other counties composing this district, except that of Norfolk, were either under the entire control and occupation of the rebels, or so nearly so that no man could go to the polls in safety, if any had been opened for the reception of votes. The following table, taken from the census of 1860, will show the population of the whole district at that time:

Counties.	Total population.	Whites.	White males.	Colored population.
Brunswick	14,809	4,992	2,459	9,817
Dinwiddie	30,198	13,678	6,837	16,520
Greenville	6,374	1,974	972	4,400
Isle of Wight	9,977	5,037	2,510	4,940
Nansemond	13,693	5,732	2,838	17,961
Norfolk*	36,227	24,420	12,091	11,807
Princess Anne	7,714	4,333	2,226	3,381
Prince George	8,411	2,899	1,463	5,512
Southampton	12,915	5,713	2,790	7,202
Surry	6,133	2,334	1,151	3,799
Sussex	10,175	3,118	1,542	7,057
Total	156,626	74,230	36,879	82,396

* In census returns Norfolk county includes Norfolk city and Portsmouth.

From this table can be seen at a glance the proportion which the population of Norfolk county when the election was held bears to that of the whole district. The committee are of opinion that this case is governed by the principles adopted by them in their report in the case of B. M. Kitchen, from the 7th district in this State, No. 14, already sanctioned by a vote of the House, and also in their report No. 9, in the case of Joseph Segar, from the first district in the State, and that in no proper sense can the vote in one county be treated as the choice of the other ten counties, prevented by the strong arm of the rebellion from expressing any wish at the ballot-box.

The committee do not deem it necessary to repeat here the reasons there given for a conclusion founded on a state of facts so similar that they could discover no new principle involved. They therefore refer to the above-named reports for a more full exposition of the views of the committee upon claims of this character, and recommend the adoption of the following resolution:

Resolved, That Lucius H. Chandler is not entitled to a seat in this house as a representative in the 38th Congress from the second congressional district of Virginia.

The report was agreed to without division, May 17, 1864.

NOTE.—The brief debate in this case will be found on page 2311, vol. 52.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

KNOX *vs.* BLAIR, *of Missouri.*

The allegations of the contestant in this case were, for the most part, so vague as to call forth the condemnation of the committee. They consist mainly of illegal voting by soldiers, who were minors or non-residents. There were also charges of military interference in behalf of the sitting member.

The committee rejected an entire poll on the ground that it was so tainted with fraud that the truth could not be deduced from the returns.

Sworn copies of muster-rolls of regiments were admitted as evidence of the *age* of a voter, and when made at the time of the election were considered admissible evidence of the number and the names of men composing the regiment.

IN THE HOUSE OF REPRESENTATIVES,

MAY 5, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

The first district of Missouri consists of the 4th, 5th, 6th, 7th, 8th, 9th, and 10th wards of the city of St. Louis and St. Louis township, St. Ferdinand and Central townships. The election was held on the 4th of November, 1862, the day provided by ordinance of convention for the regular election of representatives in Congress and State officers. The official canvass showed the following result: For Mr. Blair, 4.741; for Mr. Knox, 4,588; for Mr. Bogy, 2.536. Of this vote the soldier vote was as follows: For Mr. Blair, 698; for Mr. Knox, 964; for Mr. Bogy, 54.

This result showing a plurality of 153 votes for Mr. Blair, the certificate of election was awarded to him, and he accordingly holds the seat. Within the time prescribed by law Mr. Knox served upon Mr. Blair a notice of contest, containing eighteen specifications, in substance as follows: That at least 400 illegal votes had been cast for him—Blair—at the Abbey precinct; that 78 illegal votes had been cast for him by companies B and K, 32d regiment Missouri volunteers; that "several hundred illegal votes" had been cast for him by workmen on government gunboats at the city of Carondelet, not residents of the district; that more than 100 illegal votes were cast for him by persons temporarily employed at Jefferson Barracks, in the service of the United States, non-residents of the district; that several hundred soldiers of an Iowa regiment, name not known, non-residents, voted for him; that many soldiers, non-residents, voted for him in the eastern precinct of the 5th ward of St. Louis, and that said soldiers, with others, voted again for him at the eastern precinct of the 6th ward, in said city; that at the various precincts in the district many hundred soldiers, non-residents and minors, voted for him; that several hundred soldiers voted for him in a manner not in conformity to the requirements of the ordinance of convention; that "hundreds of minors" voted for him; that there were counted for said Blair votes not cast in conformity to law, of soldiers, some of them minors, all of them non-residents, from the following named companies of Missouri volunteers: Company B, 32d regiment; company K, 32d regiment of infantry; companies C and E, 10th regiment of cavalry; unassigned company, 10th regiment of cavalry; companies A, B, C, and E, 7th regiment of infantry; companies A and G, 30th regiment; company G, 3d regiment; companies B, C, and D, 5th regiment; company B, 31st regiment; company A, 22d Ohio, late 13th regiment Missouri volunteers; companies I and F, 8th regiment; companies D, F, A, B, K, and G, 6th regiment; company C, 27th regiment; and company G, 1st regiment of artillery; that the votes of said companies were neither cast nor returned in conformity to the laws of Missouri and the ordinances of the State convention; that "many hundreds of voters" voted in precincts other than those in which they resided, without taking the oath required by the statutes of Missouri of such voters; that poll-books of 1st Missouri artillery, 16th Missouri volunteers, and poll-books of Missouri regiments voting at Corinth, casting "several hundred more votes" for contestant than for sitting member, were never returned to the canvassers or counted; that

poll-books upon which the contestant had more votes than the sitting member were illegally rejected, marked "Book 77," "91," "44," "88," "90," "76," and "80;" that the 2d and 15th regiments Missouri volunteers, which would have otherwise cast a majority of 500 votes for contestant over sitting member, were, for the purpose of preventing them from so voting, put in motion on the day of the election at sunrise, and marched until sunset; that more than 200 legal voters of the 2d Missouri artillery, stationed in the forts around St. Louis, who would otherwise have voted for contestant, were not permitted to vote because they would not vote for sitting member; and that in order to prevent others from voting for contestant they were made to believe that they could vote only in the second district; that many minors and other persons were induced, by fear and threats of government contractors, combining with other persons in the pay and employment of the government, and by means of the establishment of a newspaper by persons holding office under the government, to vote for contestant; and that said office-holders and government contractors, by the expenditure of large sums of money, induced a large number of voters to vote for sitting member.

The sitting member, also, within the time prescribed by law, served upon the contestant his answer denying each and all the allegations of the contestant, and in turn setting out at large twelve distinct and independent allegations upon which he resists the claim of the contestant, in substance: that 240 votes, counted for contestant, cast by 12th regiment Missouri volunteers, were not cast in conformity with law—were votes of minors, non-residents of the district, and aliens; that for like reasons 233 illegal votes were counted for contestant by members of the 17th regiment Missouri volunteers, 130 illegal votes in the fourth regiment of cavalry, called "Frémont hussars," 34 illegal votes by the 5th regiment of cavalry Missouri volunteers, 116 illegal votes by 3d regiment Missouri volunteers, infantry, 16 illegal votes given by an independent battery of 1st Missouri horse artillery; that 605 illegal votes were counted for contestant in the eastern precinct of the 4th ward of St. Louis, "more than 500 illegal votes" counted for contestant in the various precincts in the first congressional district, and that for the same reasons "votes from various other companies of various other regiments" were counted for contestant "which ought not to have been;" that 250 votes cast for sitting member of persons whose names are annexed, marked H, were illegally rejected by canvassers for informalities not fatal; that "the political friends and partisans of the said Samuel Knox, with his privity, consent, and approbation, were and are guilty of each and every of the several acts of corruption, fraud, and oppression charged in his said notice against the friends and partisans" of the sitting member, "creating disturbances in the vicinity of the polls on the day of election, and by their boisterous and threatening language, and by the use of violence, detained and kept a great number of peaceable and quiet citizens from the polls;" that there were counted and allowed to contestant, in addition to the votes already enumerated, 2,080 votes in the various precincts of the first district, all of which were illegal for the reasons first alleged as to the vote of the 12th regiment Missouri volunteers.

The House will not fail to notice the extraordinary character of many of the allegations of both contestant and sitting member, as well in the matter as in the manner of their presentation. For vagueness, uncertainty, and generality, they are, in the opinion of the committee, without example, and seem to have been drawn in studious disregard both of the act of Congress and of all precedent. But as neither contestant nor sitting member was in a situation to take exception to the substance or mode of the other's pleading, the committee were not called upon for a decision upon this point, but present the case as they find it upon the record. They do not feel at liberty, however, to permit these pleadings to pass into a precedent without recording the opinion that many of the allegations on both sides are bad both in substance and form.

The constitution of Missouri requires as a qualification of voters that they shall be free white male citizens of the United States, twenty-one years of age, a resident of the State one year, and the last three months before election in the district where they vote. To this the convention which provided a provisional government for the State at the beginning of the rebellion added the following:

AN ORDINANCE defining the qualifications of voters and civil officers in this State.

Be it ordered by the people of the State of Missouri, in convention assembled, as follows:

SECTION 1. No person shall vote at any election to be hereafter held in this State, under or in pursuance of the constitution and laws thereof, whether State, county, township or municipal, who shall not, in addition to possessing the qualifications already prescribed for electors, have previously taken an oath in form as follows, namely:

"I, ——— ———, do solemnly swear (or affirm, as the case may be) that I will support, protect, and defend the Constitution of the United States, and the constitution of the State of Missouri, against all enemies and opposers, whether domestic or foreign; that I will bear true faith, loyalty, and allegiance to the United States, and will not, directly or indirectly, give aid and comfort or countenance to the enemies or opposers thereof, or of the provisional government of the State of Missouri, any ordinance, law, or resolution of any State convention or legislature, or any order or organization, secret or otherwise, to the contrary, notwithstanding; and that I do this with a full and honest determination, pledge, and purpose faithfully to keep and perform the same, without any mental reservation or evasion whatever. And I do further solemnly swear (or affirm) that I have not, since the seventeenth day of December, A. D. 1861, wilfully taken up arms or levied war against the United States, or against the provisional government of the State of Missouri. So help me God."

The convention before spoken of passed an ordinance June 12, 1862, entitled "An ordinance to enable citizens of this State in the military service of the United States or the State of Missouri to vote," which carried out the objects indicated by its title, and provided, in detail, the method of conducting such elections. A voter can cast his vote at any other precinct in the district than that of his residence by first taking an oath that he has not, and will not vote at any other precinct at that election. The voting in this district is by ballot, and the name of each voter is recorded and numbered, and the corresponding number is placed upon his ballot, which is preserved for a specified period, thus enabling parties interested, at any time, to make it certain for whom each voter cast his ballot. The notice of contestant, and answer, as well as the testimony taken by each party, with the exception of a single deposition, are all contained in Miscellaneous Document No. 15. After the hearing before the committee was commenced, viz., on the 11th of March, 1864, the deposition of Captain N. S. Constable (Miscellaneous Document No. —) was referred to the committee by the House, with instructions to consider the same, "with other evidence before them taken after the time provided by law: *Provided*, That this resolution shall refer only to affidavits and depositions, and that all such illegally taken shall not be considered by the committee." The committee were of opinion that these instructions excluded from their consideration the deposition of Captain Constable, taken more than a year after the time for taking testimony in this case had, by law, expired, and also the affidavits of Thomas Slade, (p. 143,) John B. O'Hara, (p. 195,) and of John M. Boyd and C. C. Fletcher, (p. 199,) of Miscellaneous Document No. 15, offered by contestant; all of which appear to have been taken without notice to sitting member.

The first allegation of the contestant is that 400 illegal votes were cast for the sitting member at the Abbey precinct. The names of these alleged illegal voters were attached to the notice of contest, so that the sitting member knew from the start the name of each man thus challenged. The whole vote returned from this precinct was 480, of which there were counted for Mr. Blair 424 votes, for Mr. Knox 41 votes, and for Mr. Bogy 11 votes. It is contended by the contestant that the voting at this precinct was of such a grossly fraudulent character

as to involve all concerned in it, either in participation or passive permission, and to render it impossible to sift and purge the poll. And he therefore claims that the whole poll should be rejected. The evidence shows that at this precinct, at the congressional election in 1858, only 93 votes were cast; at the same election, in 1860, only 138 votes in all; and at the judicial election in November, 1863, only 140 votes in all were cast; while in November, 1862, the year before, 480 votes were cast. And this great difference is shown in a precinct where there has been (p. 69) very little, if any, increase or change in the population. It also appears that of these 480 who voted in 1862, nineteen only voted in 1858 and 1860, thirteen of them in 1860 alone, and thirty-six of them only in 1863. It was also in evidence (p. 16) that from 1,400 to 1,500 paroled prisoners, nearly all from the States of Illinois, Wisconsin, Missouri, (outside of St. Louis,) Iowa, Kansas, Nebraska, and Arkansas, were at Benton barracks, very near the voting place of the Abbey precinct, on the day of election, and had been there for some time under the charge of Captain N. S. Constable, to whom Mr. Blair had, a few days before election, made a presentation speech on the presenting to him of a watch by some of his friends; that on the day of the election government wagons, which were under the charge of this Captain Constable, were, to the number of ten or twelve, employed during the day in taking those paroled prisoners to the polls and bringing them back, the soldiers hurrahing for Frank Blair as they went; that the names of fifty-six of these paroled prisoners, (p. 19,) all from the seventh congressional district of Missouri, were found by their own adjutant upon the poll-books at the Abbey precinct, voting in a body for Mr. Blair. Companies C and E, 10th regiment of cavalry, were stationed on election day at Camp United States Magazine and United States Powder Magazine, (p. 385,) and there voted, (pp. 108, 404.) These camps are from eight to ten miles south of St. Louis, below Carondelet; one of them very near Jefferson barracks. Other soldiers were also encamped in that vicinity. Soldiers, some from Ohio, Illinois, and other States, as well as Missouri soldiers, to the number of between one and two hundred, (pp. 17, 18,) were met in wagons and on foot between Carondelet and these camps on election day, going towards St. Louis, stating that they were from the barracks, and saying they were going to St. Louis, to vote, and hurrahing for Blair as they went. And in the evening government wagons, loaded with soldiers, shouting for Blair, (p. 56,) were seen below Carondelet, driving toward the barracks and the camps already mentioned. By a comparison of the poll-book of the Abbey precinct (p. 375) with that of companies C and E, 10th cavalry, (pp. 108, 404,) it will be seen that thirty-two of the members of those companies, who voted in their camps for Mr. Blair, travelled some twelve or fourteen miles to the Abbey precinct in St. Louis, and there again voted for him. Whether the other soldiers from other States, who were also seen going up to St. Louis, avowing a similar purpose, carried that purpose into execution, there is no positive evidence, for the want of a list of their names. If their comrades, who left a record of their names behind at the polls in their camp, found no difficulty in voting a second time at the Abbey, it is not easy to resist the conclusion that these soldiers also did not fail in the avowed object of their visit to the city. Persons well acquainted with the voters belonging in the Abbey precinct, themselves voters, (pp. 67, 71,) visited the polls at different times in the day, and though hundreds, mostly soldiers, crowded the place of voting, could see scarcely a person known to them. The judges of the election at this precinct were (p. 69) Mr. Price, B. Hamerler, and Mr. Carpenter. Yet Carpenter, without authority of law, substituted in his place (p. 70) one Jerry Millspaugh during a portion of the day, who acted as judge while he electioneered for the sitting member, and *vice versa*. The other two judges also forgot their duty as judges in their zeal for the sitting member, (p. 70.) The polls at this precinct seemed to have been under the control of one Charles Elleard, an active partisan of the sitting member, the owner

of a race-course near by, who destroyed the tickets for the other candidates, (p. 70,) put one man out of the room because he would not vote for the sitting member, declaring "we have it our own way here to-day," and, as he tore up the tickets, "damn it, we don't want any such tickets around here." (p. 70.)

Upon this proof of the manner of voting at the Abbey, the conduct of the judges in admitting illegal voters to cast their ballots in a body, without any evidence that they even administered to a single one the oath required by law of non-residents of the district—themselves acting as partisans of the sitting member, and, against law, exchanging places with other partisans not authorized to act as judges; surrendering the control of the voting place to a violent partisan of the sitting member, and at last achieving the astonishing result of polling nearly four times as many votes as were ever before or since polled at that precinct, from voters all strangers, to long residents of the district—the contestant claims that the poll itself should be rejected. In reply to this evidence the committee do not find in the whole record that the sitting member has taken any testimony to support the legality or fairness of the voting at this precinct, except the testimony of Captain N. S. Constable, the same person to whom the watch, before referred to, was presented, taken in this city, after the hearing was commenced, and excluded from the consideration of the committee by a vote of the House. The sitting member has contented himself with relying upon such testimony, as to the validity of this vote, as could be extracted from the witnesses offered by the contestant by cross-examination, which consisted in statements that there were teamsters and others in the employ of Captain Constable and others, not soldiers, and also employés of the United States at a government corral a short distance from this voting precinct, who sometimes wear soldiers' clothes, and who were believed to be citizens of St. Louis, and who might have cast this great vote. That they did no one has testified. But the name of each one of these alleged illegal voters was furnished the sitting member in the notice of contest, and he had sixty days after his answer to take any testimony he pleased as to their right to vote. A record of all the teamsters and employés of the government at Benton barracks and the government corral, not soldiers, existed at those places. It could have been compared with the poll-list, and if found there the men themselves were at hand to prove their residence in some one of the wards in this district, or others could have testified to the fact, if it existed. If these votes came from the sources suggested, the proof of it was so easy that its absence adds weight to the testimony given against their legality. There is also positive testimony that eighty-eight of those voters whose names are given fraudulently cast their votes in a body, without question or precaution on the part of the judges, and the proof is little less conclusive as to many more. Indeed, it is difficult to see in the manner in which this election was conducted any limit beyond an exhaustion of the supply of men to the number of votes returned from this precinct.

When the result in any precinct has been shown to be "so tainted with fraud that the truth cannot be deducible therefrom," then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction, but call for the rejection of the entire poll when stamped with the characteristics here shown. In the late case of Blair *vs* Barrett, decided in the 36th Congress, (1st session, Report No. 563,) in a contest in substantially the same district, the entire vote of four precincts was thrown out for reasons so similar to those existing in this case that the committee take the liberty to quote at length from the report in that case, which was adopted by the House, and forms a precedent for our guidance.

In speaking of the great increase of the vote of certain precincts over that of previous elections, the committee say:

> If such increase had been attributable to increase of population, it must have been, unde the law requiring a year's residence in the State before voting, from an addition to the popula[illegible] arrived in the city a year previous to the day of the election; if from out of

the State, or from some other part of the State of Missouri, three months at least before that day. The presence of a new voting population of five thousand, with all the families and other indications of their existence which move with them wherever they go, and stop with them wherever they abide, could hardly escape notice for a year, or even three months. It could hardly be expected, either, that any such actual and *bona fide* accession to the voting population would have cast its entire strength for the candidate of one party alone. To some extent such increase would naturally be expected to distribute itself somewhat among all parties. The committee have not been pointed to any instance elsewhere of so great an increase to the voting population of such a territory in so short a time without any known cause or source, or special indication of its presence, and all of one political faith, and casting its first vote in a body for one of three different political candidates, all at the same time and place equally active in canvassing for votes. This district is divided into thirty-five election precincts or sub-districts, and any honest increase of votes arising from natural increase of population would generally find itself distributed among them all; yet it is nearly all found in seven or eight out of the thirty-five.

These remarkable features of this case, disclosed in the outset, led the committee early to direct a most scrutinizing inquiry into the manner of voting, the qualification of voters, the conduct of the judges of elections, and of others in these precincts. The evidence shows that great irregularities existed at nearly all of them; and just in proportion as these irregularities were frequent and glaring did the increase of vote for the sitting member over the vote cast for the candidate of his party two years before show itself.

* * * * * * *

Men unknown in the precinct when they offered to vote were permitted to cast their ballots without question, and without first taking oath, as the law requires, that they "had not voted and would not vote in any other precinct in the district." Violent and tumultuous crowds surrounded the polls, and at times had such possession of them, and power over the judges, as to render it almost, if not quite, impossible for any one to approach the polls or cast his vote, unless he carried a ballot for the sitting member. * *

An examination of the poll-books and abstract of votes at these precincts, which are a part of the proofs, discloses evidence of these irregularities and the facility they afforded for fraudulent voting. The conviction is forced upon the committee that this facility was eagerly and largely availed of, if it were not the cause and temptation to much of the fraudulent voting. In several of these precincts it does not appear that any oath had been taken by the judges of election, which, if nothing else, might be supposed to be some check upon a disposition to disregard or overlook the requirements of law. * * * *

The poll-books show that the same person cast more than one vote, sometimes more than two—sometimes at the same precinct, and sometimes at different ones in the city—multiplying in this way his vote manifold in the general result. * * * *

In this connexion they cite a late case of contested election in a court of law, the case of Mann *vs.* Cassidy, for the office of district attorney in the city of Philadelphia, at an election held October 14, 1856, contested in the court of quarter sessions in that city. The facts in that case, as summed up by the presiding judge, are so parallel with those disclosed in this case that the committee take the liberty to append them to this report in an appendix, marked A, and solicit the attention of the House thereto. A reading of the evidence, as thus summed up, and as contained in the proofs in this case, would almost lead to the conclusion that the one had been taken as the pattern of the other. After summing up the testimony at length, the judge concludes: "As the case now stands before us, we should be derelict in our duty did we not unhesitatingly express our conviction that the acts of the officers, in the election divisions to which we have referred, in the receipt and recording of votes, are so utterly and entirely unreliable that the truth cannot be deduced from any records or returns made by them in relation thereto." And he adds: "Had we not erased from the petition the specifications alleging gross frauds and irregularities on the part of the election officers in the divisions referred to, a different course would certainly have been adopted. The entire proceedings were so tarnished by the fraudulent conduct of the officers, charged with the performance of the most solemn and responsible duties, that we would not only have been abundantly justified, but it would have been our plain duty, to throw out the returns of every division to which we have referred."

Following these precedents, based upon facts so similar that either might be taken for the other, and in accordance with their own conviction, that the truth cannot be deduced from the returns furnished by the judges at the Abbey precinct, the committee are of opinion that it should be rejected, and not be made a part of the count of votes in this district.

B and K, 32d regiment.—The second specification of contest is, that seventy-eight non-residents of the district voted for the sitting member, in companies B and K, 32d regiment of Missouri volunteers. The former voted in camp, in the 7th ward, and its poll-book (p. 109) returns 17 votes for Blair, 2 for Knox, 1 for Bogy; the poll-book of the latter (p. 108) returns 61 votes for Blair, and

none for the other candidates. The contestant offered what he alleged were copies of the muster-rolls of these companies, (pp. 200–203.) The sitting member objected to these muster-rolls, and to all others offered by contestant, thirty-seven in all, found between pages 199 and 297, for the following reasons: Because, 1st, they "are neither certified copies nor sworn copies, in any true sense of the word;" that the papers, from which those copies purport to have been taken, were not in the proper place of deposit, nor in the hands of the legal custodian, and that they are, in many instances, copies of copies. The testimony shows (p. 90) that the papers are copies of muster-rolls found in the adjutant general's office of the State of Missouri, made by the witness, and sworn to as true copies by him. The committee are of opinion that, inasmuch as these are muster-rolls of regiments raised by the State of Missouri, and afterwards mustered into the service of the United States, the rule of the military service requiring one copy of these rolls to be deposited with the Adjutant General of the United States at Washington does not make either the copy deposited with the adjutant general of Missouri or that kept with the regiment copies of the one so deposited in Washington any more than that is a copy of either of them, but that either and each of them may be treated as an original, and the muster-roll of the regiment for all purposes for which it is to be consulted as such, and the adjutant general of Missouri a proper custodian thereof. "Sworn copies" of papers are expressly recognized in the act of Congress providing for taking testimony in contested election cases.—(Brightley's Dig., p. 255.) The committee, therefore, deemed these papers as properly authenticated. It was claimed by the contestant that these muster-rolls were evidence of the following facts, viz: who were members of the regiment to which the rolls belonged, and what was the age and residence of the soldier enlisting. While, on the other hand, it was objected by the sitting member that, if properly authenticated, still the rolls would be evidence of nothing except the facts required by law to be recorded in them, and that neither the age nor the residence of the soldier was required to be inserted upon the muster-roll, and could not, therefore, be proved by it. The committee were of opinion that the law requires that the age of a soldier must be made known at the time of his enlistment; that by act of Congress (St. 12, p. 502) the oath of enlistment is conclusive against the soldier as to his age; and that the record of age made from the oath of enlistment upon the muster-roll, by the proper officer at the mustering in, should be taken as *prima facie* evidence of the age of a recruit by third persons, especially by those who seek to avail themselves of the vote of such soldier. But the committee are of opinion that the muster-roll is not evidence of the residence before enlistment of the soldiers whose names it bears. It is not of the slightest consequence to the recruiting service to know the residence of the recruit. The law does not require it to be ascertained, nor does the muster-roll purport to give it, but only the place where the recruit "joined for duty and was enrolled." But it is known that recruits are constantly going from all parts of a State and from different States to favorite places of rendezvous, and there enlisting, so that the place where a recruit enlisted is no evidence of his residence.

While, therefore, the committee admit the muster-rolls as evidence of what men compose a regiment, and of their age, they are still only evidence of those facts at the time the muster-roll is made out. The certificate at the bottom of the muster-roll expresses what, in these particulars, it is evidence of, and is in this form:

I certify, on honor, that this muster-roll exhibits the true state of ——— company —, of the ——— regiment Missouri volunteers, for the period herein mentioned; that each man answers to his own proper name in person; and that the remarks set opposite the name of each officer and soldier are accurate and just.

———— ————,

Captain Company ——, Missouri Vols.

But the committee are of opinion that a muster-roll made out a long time before the day of election (November 4, 1862) is not evidence of the "true state" of a regiment at that time. Regiments are constantly changing. With many of them recruiting is all the time going on, and men are every day discharged. It cannot, therefore, be safe to say that because a name is not found on a muster-roll made out in 1861, that that person was not a member of the regiment November 4, 1862, when the election took place. They therefore rejected all the muster-rolls offered as evidence of who did and who did not belong to the respective regiments on the day of election, excepting the following, viz: Company B, 32d regiment, (p. 200,) dated December 8, 1862; company K, same regiment, (p. 203,) same date; Naughton's company, 28th regiment, (p. 206,) dated September 12, 1862; company L, 10th cavalry, (p. 209,) dated October 28, 1862; company B, 31st regiment, (p. 212,) dated August 28, 1862; and Captain Cain's company, 10th cavalry, (p. 292,) dated October 31, 1862. All these muster-rolls, made so near the time of the election, were held by the committee to be *prima facie* evidence of what persons belonged to the respective regiments enumerated. So that if the name of a voter was not found upon these muster-rolls, it was incumbent upon the party claiming the vote of such a person as a member of one of these regiments to show that fact. But all the other muster-rolls, bearing date from one year to a year and a half prior to the day of the election, were not deemed by the committee safe evidence of membership sufficient to be taken as *prima facie*. But all these muster-rolls show the age of the soldier when he enlisted and the time of enlistment, and therefore of age one is as good evidence as another, and all are admitted as evidence to that extent, leaving each party at liberty to controvert them by other evidence.

Applying this rule to the muster-rolls of B and K, 32d regiment, (pp. 200–'1 and 203–'4,) it will be found that on muster-roll of B, (p. 200,) compared with poll-book of the same company, (p. 109,) five minors voted for Blair and one for Knox, and ten voted for Blair whose names are not found on the muster-roll as belonging to that regiment. A like comparison of the poll-book and muster-roll of company K, (pp. 108, 203–'4,) will show that nine minors and sixteen not on the muster-roll voted for Blair, and the testimony (p. 92) shows one other, a non-resident, so voting.

The names of all these persons were given in the notice of contest to the sitting member, at the outset, as illegal voters. Every facility existed for meeting this evidence, but nothing was offered to contradict it, and the committee rejected as illegal the foregoing votes from these companies.

Tenth specification.

The allegation in this specification is that the votes of the several companies therein named were, for reasons therein specified, illegal. The first two companies here designated are the companies B and K, 32d regiment Missouri volunteers, already considered. The next is company C, 10th regiment Missouri volunteers. A comparison of the muster-roll of this regiment (p. 206) with the poll-book (p. 108) shows that two minors cast their votes for Blair. Six casting their votes for him are not to be found on the muster-roll, and twenty-five are returned as "river men;" which means, as the committee are informed, that the men live upon the river in boating and kindred employments, without claiming or having a residence in this district. The poll-book of "detached unassigned recruits," 10th Missouri volunteers, (p. 107,) returns also seven "river men," voting for Blair. A comparison of the muster-roll of company C, 7th regiment infantry, (p. 230,) with the poll-book (p. 100) shows the votes of two minors for Mr. Blair. The same comparison of muster-rolls of company E (p. 223) with its poll-book (p. 100) discloses the votes of four minors for Mr. Blair. The poll-book of company B, (p. 101,) same regiment, shows one vote for Knox from a

resident of the second ward, which is not in the district. Three minors voted for Mr. Blair in company G, 6th regiment volunteer infantry, (pp. 107, 221,) and these several votes were rejected by the committee.

Under the other specifications in the notice of contest the contestant has offered, and there will be found, much evidence tending to show that fraudulent voting was extensively practiced at very many of the precincts throughout the district. At Carondelet, about ten miles below St. Louis, an active partisan of the sitting member, Captain Eads, was at the time of this election building gunboats, and having a large number of men in his employ. They came from all parts of the country, (p. 39.) Some of them had families in St. Louis, and, boarding at home, went and returned on the cars when they had employment. Mr. Eads took an active part previous to the election for Mr. Blair, and induced his men to go up to St. Louis to attend preliminary meetings, and provided tickets for them upon the cars, (p. 42.) On one occasion tickets were so furnished them to attend a meeting in St. Louis, at which Mr. Eads himself was going to speak, (p. 43.) On the day of election large crowds of these gunboat men took the cars at the voting place in Carondelet for St. Louis, after voting had been going on for some time, late in the forenoon, and a gentleman working as foreman for Mr. Eads passed through the cars and distributed the tickets for Blair, one of the crowd stating as they went that "they were all for Blow and Blair, helping Blow down there in Carondelet, and Blair in the city of St. Louis;" and "that they had succeeded in getting in a good many votes before the old judge asked them too closely about their residence, how long they had been there, &c., but that he had got too particular, and some of them could not vote at that poll." There were two or three passenger cars filled with these men on that particular train, (pp. 56, 57.) But although these men set out for the avowed purpose of casting fraudulent votes, and were furnished with tickets by the foreman of their employer, and were carried from the poll in one district where the judge had become too particular for dishonest voters into this district under the guidance of the employer of Mr. Eads, who distributed among them votes for Mr. Blair as they went, yet these men are traced to no poll in St. Louis. Their names are not given, so that no examination of the poll-list will enable the committee to detect them. However strong the tendency of this testimony, it lacks this link, and the committee cannot say how many of them voted, nor at what poll they voted, nor for whom. The committee have, therefore, rejected no votes from any poll on account of gunboat men from Carondelet. For similar reasons, though the evidence had a strong tendency to show much fraudulent voting in St. Louis by men from Jefferson Barracks and United States magazine, and also of soldiers going from precinct to precinct in the city, yet the evidence failed either to furnish their names, except the thirty-two at the Abbey, so that the committee could themselves detect them on the poll-book, or to trace the voter himself to any particular poll, and therefore no votes on account of these allegations or proofs have been rejected by the committee.

The sitting member, under his specifications, has confined himself almost entirely to the alleged illegality of the vote cast by the soldiers composing what was known as the "Osterhaus brigade," composed of the 3d, 12th, and 17th regiments infantry, 3d and 4th cavalry, Missouri volunteers.

The allegations of the sitting member against this brigade are, first, that a large number (he claims 302) voted as soldiers in this brigade who did not belong to it; and, second, that a large portion of the others were non-residents of the district, and he insisted that upon the evidence in the record adduced in support of these two allegations, the vote of the whole brigade, 744 votes, should be thrown out. First, the committee call attention to the evidence offered in support of his allegation that 302 votes were cast by men not members of this brigade. It consists almost entirely of the muster-rolls of the regiments composing this brigade. It is proper, however, to state that the

sitting member contended against the admissibility of muster-rolls for any purpose, and only claimed that they are to be admitted as evidence for him, if for the contestant. The muster-rolls offered by the sitting member are found on pages 242, 245, 248, 251, 254, 257, 260, 263, 264, 267, 270, 272, 274, 276, 278, 280, 288, 290; and the poll-books with which they are compared are to be found on pages 306, 307, 308, 309, 310, 311. By reference to the muster-rolls it will be observed that none of them purport to show the true state of the company later than December 30, 1861, and some of them bear date as long ago as August, 1861. They could not, therefore, be taken as showing the true state of the brigade in November, 1862, and would therefore be excluded, when offered for that purpose, by the rule applied by the committee to those offered by the contestant. But it appeared, by direct testimony, that recruiting for these regiments had been going on after these muster-rolls were filed in the office of the adjutant general, and previous to the election one hundred and fourteen were shown to have been added to the 12th regiment in the winter of 1861–'62, (p. 349.) One witness was on recruiting service in St. Louis for the 17th regiment when his deposition was taken, February 10, 1863, (p. 364,) and another testified (p. 341) that there were recruiting officers all over St. Louis city and county, recruiting for the Osterhaus brigade, from August, 1861, down to the time of the taking his deposition, February 13, 1863. The committee are confirmed by this testimony in the correctness of their conclusion that these muster-rolls, showing the state of the brigade so long a time before the election, and before this recruiting had taken place, could not be relied upon as showing who composed the regiments on that day. One other remark is pertinent to the claim of the sitting member, that so large a number of names on the poll-books of this brigade are not to be found on its muster-rolls. The names are nearly all those of Germans, very difficult of pronunciation, and in many instances an American would find it impossible to spell the name correctly on hearing it pronounced. Yet the sitting member seems, in comparing the muster-rolls with the poll-books, as printed, to have pronounced every name on the one as not on the other, if they were not identical in orthography. The committee, in their comparisons, found over eighty such names, but their conclusion that the muster-rolls did not show the true state of the brigade on the day of election renders any comparison of this nature unnecessary. These rolls, however, do disclose the names of twelve minors voting for contestant, and they are rejected.

The sitting member also offered the testimony of witnesses to show that these regiments were composed entirely of non-residents, and therefore not legal voters. Attention has already been called to the fact that recruiting officers for some of these regiments had been engaged all over St. Louis city and county since August, 1861. It was also testified that company H, 12th regiment, was entirely recruited in the tenth ward, and several other companies in that part of the city which is in this district, (p. 365.) There was other testimony of a like character as to several other companies, tending to show that they were originally recruited in whole or in part from the first district, besides the recruits they had received from time to time from the same quarter, (pp. 337, 343.) But the sitting member submitted testimony from the record concerning many who had voted in this brigade, who, the committee were satisfied, were non-residents, and they were accordingly rejected by them from the count. The attention of the House will be called to the testimony applicable to each company by itself.

Company K, 17th regiment.—The entire vote of this company was twenty-one for Knox. A soldier belonging to this company, (p. 372,) on being shown a list of its voters, testifies that all except two were residents of Iowa prior to and at the time of their enlistment; was at headquarters when transportation was sent up to Guttenburg and Dubuque, Iowa, for them, and when they arrived. Of the two exceptions, he testifies that one resided in Dubuque, but

enlisted in St. Louis; the other resided in the first district, though but a short time before he enlisted. This testimony is not controverted, and twenty of these votes are rejected by the committee.

Company I, same regiment, gave three votes for Knox, and the only testimony offered is that of a witness who testifies, (p. 328,) that, from what one of them told him once in 1861, he knew he was from Cincinnati. But the committee were of opinion that this was not competent evidence to prove in this case that the voter was not at the time of the election a resident of the district, and so none of this vote was rejected.

Company B, same regiment, gave thirty votes for Knox. A witness testifies (p. 328) that two of them named were intimate friends of his, and were at the time of their enlistment from Cincinnati. Another, a lieutenant, testifies, (pp. 239, 330,) that of the list of voters in this company there were but two citizens of St. Louis, and that the others were recruited by him at Cincinnati and Philadelphia, and of these two, the captain testifies (p. 340) that one was a resident of Illinois and the other of the first district. Twenty-nine of the thirty are therefore rejected by the committee.

Company F, same regiment, gave twenty-seven votes for Knox. One witness testifies (p. 328) that he was in Cincinnati two years ago, and knew that Sternberg and Schaub lived there then, and was at headquarters when they came there, and they told him that they lived there at the time of their enlistment. But two other witnesses testify (pp. 330, 331) that one of these men, Schaub, as well as several others named, were from St. Louis. There is no evidence given which shows that any other voter in this company was a non-resident, and the committee reject the one vote of Sternberg only.

Company A, same regiment, gave thirty-nine votes for Knox. It was testified by two witnesses (pp. 334, 336) that nine of this list were non-residents, and they are rejected accordingly.

Company H, same regiment, gave twenty-five votes for Knox, and a witness testifies (p. 337) that two of them were residents of Fond du Lac, Wisconsin, and they are rejected.

Company D, 12th regiment, cast forty-six votes for Knox. One witness, a member of the company, testifies (p. 360) that this whole company was recruited in the first, second, and third wards—the second district. But he is evidently mistaken, for his captain (p. 332) gives the street where his company was recruited in the first district. The same witness (p. 333) testifies that three named by him of this company, Buckholtz, Schmidt, and John Webber, were non-residents. He also testifies that several others told him that they were non-residents, and one that he was a minor; but the committee rejected the three votes named only.

Company C, same regiment, gave thirty-three votes for Knox. Two witnesses testify, (pp. 333, 360,) one of them orderly sergeant of the company, that most of it was recruited in Cole Camp; that ten names shown them were non-residents; one testifies that eleven of the company did belong to St. Louis, (p. 348.) These witnesses testify that others on the list of voters they did not know as belonging to the company, and one of them, the orderly sergeant named, testifies to returning from recruiting to his regiment at St. Genevieve. Being with it "several times during three or four days," and examining the books, he thinks there could have been no such recruits without his knowing it, but states also that the first lieutenant was also recruiting, and he did not know the recruits recruited by him. The committee therefore rejected from this company only these ten votes of those testified to be non-resident.

Company I, same regiment, gave twenty-seven votes for Mr. Knox. The only testimony respecting it is that of two witnesses, members of the regiment, but neither of them of this company. One testifies (p. 347) "the company was raised in Davenport, Iowa, all except four or five, which were obtained in

St. Louis;" the other, Benther, who seems to have been relied on for much service as a witness as to many other companies as well as his own, who testifies (p. 360) "a part came from Iowa under Captain Ahlefield, which was company I." No question is put to either of these witnesses to ascertain their means of information as to the residence of soldiers of a company of which neither was a member, nor was any other evidence introduced to controvert the statement. One of the soldiers who voted was of the "four or five which were obtained in St. Louis," and the committee rejected the other twenty-six.

Company K, same regiment, cast thirty votes for Knox, and it is testified by a resident of Bon Homme township, which is not in the district, (p. 350,) that eleven of those named were his neighbors, well known to him to be residents of that township. This evidence does not seem to be controverted, and that number (eleven) is rejected from this poll.

The 5th regiment of cavalry voted at Ironton, Missouri, (p. 386,) and gave thirty-four votes for Knox. It is claimed by the sitting member that this entire vote should be rejected for two reasons: First, because notwithstanding the name of the regiment and place of voting are properly designated, yet the company is not designated. But there is no requirement of law that the company should be stated upon the poll-book, and no necessity for it, if but one voted. Yet, if the law required this duty of the officers of election, the omission of it by them would not deprive the legal voter of his voice in the election if he had cast his vote as required by law. The other objection to this vote is this: One witness (p. 339) testifies that company G came from Wisconsin, and that John H. Baltorf was not recruited in St. Louis. Now, the name of John H. Baltorf is found on the poll-book as voting for Knox, and the sitting member, claiming that this witness had testified that Baltorf belonged to company G, insists that this proves that it was company G which voted at Ironton, and that it is also evidence that the whole number of votes here voting were from Wisconsin But a reference to the whole testimony of this witness (pp. 339 and 340) will show that he nowhere testifies that Baltorf belonged to company G. If, therefore, the conclusion is logical, the premises upon which it is based are not proved, and the whole fails. Besides, all the knowledge the witness has of the residence of Baltorf is what Baltorf himself told him at some time not stated, (p. 340.) The committee have not rejected any votes from this poll.

This constitutes all the material evidence submitted from the record by the sitting member to sustain his allegations against the Osterhaus brigade.

The poll-books from several companies were rejected by the official canvassers because of informalities in the returns. The following is a list of the polls thus rejected, with the reason for the rejection of each as certified by the secretary of the board of canvassers:

List of rejected poll-books, November election, 1862.

H, 7th regiment infantry; camp near Jackson, Tennessee. Rejected for want of a certificate.

F, 7th regiment infantry; Jackson, Tennessee. Rejected for want of abstract of votes.

I, 3d regiment infantry; Iron county, Missouri. Rejected for same reason.

A poll-book. Rejected for want of a designation to show that it was a military vote. No regiment nor company indicated.

I, 30th regiment infantry; Pilot Knob, Missouri. Rejected for want of an abstract of votes.

A, 29th regiment infantry; Jackson, Cape Girardeau, Missouri. Rejected for want of a certificate.

H, 30th regiment infantry; Camp Farrar, Pilot Knob, Iron county, Missouri. Rejected, as the voters register their names as living in other counties.

A poll-book. Rejected for want of certificates and indication of regiment and company.

A poll-book. Rejected for want of certificates. No regiment or company indicated.

F, 29th regiment infantry; Camp Peckham, Cape Girardeau, Missouri. Rejected for want of a certificate.

D, 2d regiment artillery. No place indicated where election was held, and rejected for want of a certificate.

D, 30th regiment infantry; Camp Farrar, Pilot Knob, Missouri. No abstract of the votes.
K, Colonel Gray's regiment M. S. M.; South Big River bridge, I. M. R. R., Missouri. Rejected for want of a certificate, the same having been torn off before the book came to this office.
1st Missouri light artillery. No place indicated where election was held, and no certificate.
B, 3d regiment infantry; Pilot Knob, Missouri. Rejected for want of a certificate.
A, 1st Missouri light artillery: camp at Ironton, Missouri. No abstract of votes.
Pioneers, 4th regiment infantry; Moselle bridge, Missouri. No abstract of votes.
E, 27th regiment infantry; Camp Blair, Livingston county, Missouri. No abstract of votes.
A poll-book; Ironton, Iron county, Missouri. Rejected for want of some certificate to indicate that these are soldiers' votes.
C, 4th regiment cavalry; camp near Ironton, Iron county, Missouri. Rejected for the reason that one judge only signed the certificate.
A poll-book; Ironton, Iron county, Missouri. Rejected for want of some indication to show that it was the vote of soldiers.
D, 10th Missouri cavalry; Camp United States magazine, St. Louis county, Missouri. Rejected for the reason that one judge only signed the certificate.
C, 30th regiment infantry; Camp Farrar, Pilot Knob, Iron county, Missouri. No abstract of votes.
D, 27th regiment infantry; Camp Blair, near Chillicothe, Missouri. No abstract of votes.
13th regiment cavalry, M. S. M.; headquarters Waynesville, Missouri. No abstract of votes.

In the opinion of the committee, all of the polls which were rejected for want of "an abstract of votes" were erroneously rejected. The abstract is simply a computation or casting up of the votes, not required by law, and, if erroneously done, to be corrected. The name of each voter and the person for whom he voted is given in each case, and the computation left to be made is not only perfectly easy, but is what is being done all the way through this investigation. The committee have therefore taken into the count all polls rejected for this reason. The following table shows what polls are thus included, and for whom the vote was cast in each case:

	Knox.	Blair.
Company F, 7th regiment Missouri volunteer infantry	0	75
Company I, 3d regiment Missouri volunteer infantry	0	8
Company I, 30th regiment Missouri volunteer infanty	1	11
Company D, 30th regiment Missouri volunteer infantry	0	11
Company A, 1st regiment Missouri light artillery	30	15
Company of pioneers, 4th regiment of infantry	4	3
Company E, 27th regiment Missouri volunteer infantry	0	33
Company C, 30th regiment Missouri volunteer infantry	0	25
Company D, 27th regiment Missouri volunteer infantry	0	6
	35	187

But a comparison of the muster-roll of company F, 7th regiment Missouri volunteer infantry, (p. 236)—the only one of the poll-books of these companies found in the record—with its poll-book (p. 393) discloses six minors voting for Mr. Blair, and the poll of this company is reduced to sixty-nine accordingly. For the reason already stated the other polls cannot be compared with the muster-rolls of the respective companies. The aggregate of the rejected vote, which the committee have thus included, is, therefore: For Mr. Knox, 35; for Mr. Blair, 181.

The committee have thus, as well as they have been able, considered all the testimony in this voluminous record which they have deemed material to the issues presented. They have found much that is uncertain and unsatisfactory, and no little that is irrelevant; they have also found great difficulty in sifting this evidence, and in determining the weight to which it is all entitled. The result from it all, to which they have arrived, they now submit to the House as

The official canvass gives to the sitting member and contestant the following vote:

		Blair.
Official		4,741
To be added from rejected polls		181
		4,922
To be deducted, rejected by committee:		
At Abbey precinct	424	
Company B, 32d regiment	15	
Company K, 32d regiment	26	
Company C, 10th regiment	33	
Unassigned, 10th regiment	7	
Company C, 7th regiment	2	
Company E, 7th regiment	4	
Company G, 6th regiment	3	
		514
		4,408

		Knox.
Official		4,588
To be added from rejected polls		35
		4,623
To be deducted, rejected by committee:		
At Abbey precinct	41	
Company B, 32d regiment	1	
Company B, 7th regiment	1	
Osterhaus's brigade, company K, 17th regiment	12	
Osterhaus's brigade, company K, 17th regiment	20	
Osterhaus's brigade, company B, 17th regiment	29	
Osterhaus's brigade, company F, 17th regiment	1	
Osterhaus's brigade, company A, 17th regiment	9	
Osterhaus's brigade, company H, 17th regiment	2	
Osterhaus's brigade, company D, 12th regiment	5	
Osterhaus's brigade, company C, 12th regiment	10	
Osterhaus's brigade, company I, 12th regiment	26	
Osterhaus's brigade, company K, 12th regiment	11	
		166
		4,457

Plurality for Mr. Knox, 49 votes.

The committee, therefore, submit the following resolutions:

Resolved, That Francis P. Blair, jr., is not entitled to a seat in this house as representative in the 38th Congress from the first congressional district in Missouri.

Resolved, That Samuel Knox is entitled to a seat in this house as a representative in the 38th Congress from the first congressional district in Missouri.

MINORITY REPORT.

JUNE 2, 1864.

Mr. GANSON, from the minority of the Committee of Elections, submitted the following report:

They have carefully considered the questions of law and fact involved in the contest, and have come to the conclusion that Mr. Blair was duly elected.

The questions presented by contestant arise on his first specification, charging that illegal votes were received at the Abbey precinct; and on his 2d and 10th, charging that such votes were also cast for the sitting member in various army organizations.

The questions presented by the sitting member arise on charges, six in number, of similar voting for contestant in what is known as the *Osterhaus brigade*, and in his 10th specification charging that the canvassing officers improperly rejected certain returns of army votes in his favor.

We shall follow the committee in its order of treating these subjects, and shall first consider the questions connected with the

ABBEY PRECINCT.

We contend that the poll-book of the Abbey precinct should not be rejected from the count:

1st. Because the contestant makes no charge of fraud against the officers conducting the election at this precinct, and does not claim the rejection of the poll in his notice of contest.

2d. Because, if it was allowable to present new grounds of contest at the hearing before the committee and the House, the charges now presented, if admitted to be true, would not warrant such rejection.

3d. Because the charges are not sustained by the proofs.

The 1st section of the act of 1851 (9th Statutes, p. 568) requires that the grounds of contest shall be *specified particularly* in the notice of contest.

This is but the re-enactment of the parliamentary rule; and the practice has been uniform under this to restrict the contest to the points presented in the notice; and the 9th section of the act declares all evidence illegal which does not bear on the specifications of the notice, by restricting the evidence to be taken to the specifications made in the notice. The only ground presented by the contestant, in connexion with this precinct, is contained in his first specification, which is in the following words:

1st. That at least 400 illegal votes were cast for you at a precinct known as the Abbey precinct, in said district. That the persons voting had not been citizens or inhabitants of the State of Missouri for one year previous to said election; nor had they been residents of said district for three months previous to said election. Many of said voters were minors under the age of twenty-one years. A list of the voters whose votes are contested is annexed to and made a part of the notice.

It will not be pretended that this notice declaring the intention of the contestant to contend meant merely that the individuals named were not qualified voters, for one or the other of the reasons mentioned contains, either in form or substance, notice that it would be "contended by the contestant that the voting at this precinct was of such a grossly fraudulent character as to involve all concerned in it either in participation or passive permission, and to render it impossible to sift and purge the poll"—which the committee report to be the present ground taken by the contestant.

It is unnecessary to argue this proposition. It is so plainly an attempt to substitute [redacted] new and different ground of contest from that specified in

he notice that the unfairness and illegality of the proceeding is self-evident. t is unnecessary, also, because this course is subsequently recognized by the ommittee itself to be illegal, even whilst declaring their purpose to allow it to e done.

They say: "The House will not fail to notice the extraordinary character of ıany of the allegations of both contestant and sitting member, as well in the ıatter as in the manner of their presentation. For vagueness, uncertainty, and enerality, they are, in the opinion of the committee, without example, and seem) have been drawn in studious disregard both of the act of Congress and of all recedent. But as neither contestant nor sitting member was in a situation to ıke exception to the substance or mode of the other's pleading, the committee 'ere not called upon for a decision upon this point, but present the case as they nd it upon the record. They do not feel at liberty, however, to permit these leadings to pass into a precedent without recording the opinion that many of ıe allegations on both sides are bad, both in substance and form."—(Report, age 2.)

Our position with reference to the insufficiency of the first specification or llegation to enable the contestant to claim the rejection of the Abbey poll 'ill not be controverted, we believe, by the committee; nor will they deny that ıe language just quoted was intended to justify them in overlooking the defect f this allegation in form and substance for the object sought under it. Here, ıen, is an acknowledged defect, which leaves the contestant without a case; for 'ithout the rejection of this poll he is defeated by nearly four hundred votes. ınd the committee avow themselves "not called upon for a decision upon this oint," but assume to have exhibited impartiality by overlooking like defects, 'hich, they say, are to be found in the pleadings of the sitting member. Having)ld the House that the parties have drawn their pleadings "in studious disre- ard both of the act of Congress and of all precedent," they *then* inform that ody that they themselves have imitated the parties, and have also disregarded ıe rules of law in conducting the inquiry referred to them.

Is it an admissible principle that, instead of considering what is alleged, and 'hether the allegations made are proved in their proper order, the committee hould enlarge the scope of the allegations of the parties at their discretion? ;ven if it were possible to be perfectly impartial in such relaxations of legal rinciples, it would not be possible to adjust the scale of indulgence evenly etween the parties even in ordinary circumstances, and certainly not in the xasperated state of feeling which surrounds this case. How, for example, can ıe committee assume the position of being just towards Mr. Blair, when they ermit Mr. Knox to make a new allegation, under which he is enabled to throw ut some four hundred votes as spurious, whilst, under the allegation which ccompanied his notice, he could affect but about seventy votes at the utmost? 'hey certainly have not struck off four hundred votes from Mr. Knox's poll, 'hich would be the practical test of fairness; and if it be said that, in part equital, they have added one hundred and eighty-five votes to Mr. Blair's poll 'hich the canvassers disallowed, the reply is: they have done so under the trictest and most technical charge; that the action of the canvassers was, with espect to the returns in question, erroneous.—(See 10th specification, page 304.)

In dealing with this case, the committee expressly declare, in the passage we ave quoted, that their action in it is not to be taken as a precedent. We hope ot; we trust, indeed, that the House will take care that it shall not be a recedent.

2. Nor would the circumstances recited by the committee, if admitted to be rue, support the allegation made for the first time in the committee-room, viz: hat "the voting at this precinct was of such grossly fraudulent character as to ıvolve all concerned in it," and make it proper to reject the whole poll; nor 'ere the polls rejected in the case of Blair *vs.* Barrett, cited as a precedent for ıis case, rejected upon the grounds stated in the report before us.

Something more is wanting to convict duly selected officers, acting under oath, of perpetrating a fraud, than merely showing, first, that fifty-six paroled prisoners and thirty-two cavalry men, and possibly others, succeeded in getting their votes taken when they should not have been received. Second. That at various times during the day crowds of persons were seen about the polls, and probably voting, who were unknown to two of the neighbors. Third. That one of the judges did not act, during the whole day, in his official capacity, but only during part of the day. Fourth. That a single friend of the sitting member was disorderly in the neighborhood of the polls; and, fifth, that it is not proved *affirmatively* that the judges administered the oath required in cases of persons voting at other than their own precincts. These are the statements or charges made in this case. We have but to compare them with the charges made in the case of Blair *vs.* Barrett to see how entirely different, in all respects, the cases are.

In that case the tenth charge was, that, at the western precinct of the ninth ward, Barrett dealt out liquor freely in a house near the polls, contrary to law: that by this means he induced many persons to cast illegal votes, and his partisans were stimulated to commit violence on the judges, actually having struck one of them; that by such means the judges were intimidated and made to receive many hundreds of illegal votes. The eleventh charge was, that the election at the Gravois coal mines was conducted in gross fraud; that the judges refused to administer the oaths required by law, allowed great numbers of votes to be cast that they knew to be illegal, threatened to commit violence upon those who challenged the fraudulent votes; that Barrett was present and countenanced these frauds; that one of the judges could not read, another judge and one of the clerks had been convicted of felony, and that neither of the judges nor of the clerks were sworn.

The twelfth charged the judges of the eastern precinct of the ninth ward with fraudulently refusing to allow challengers; refusing to administer the oaths required by law and to question fraudulent voters when challenged.

The thirteenth charged the same facts against the judges of the eastern precinct of the eighth ward.

The nineteenth charged that the judges and clerks at the eastern precincts of the fifth, sixth, seventh, and eighth wards, at the Gravois coal mines, at George Sappington's house, and at the Harlem house, were not sworn.

The tenth, eleventh, twelfth, and thirteenth charges were sustained; and so much of the nineteenth as charged that the officers of elections at the Gravois coal mines, at George Sappington's, and the Harlem house, were not sworn: and they were excluded by the committee and the House in that case; *and these last named were the only polls excluded in that case at all.*

The polls of the eastern precincts of the eighth and ninth wards, and the western precinct of the ninth ward, although tainted with fraud by the intimidation of the judges, by their *refusal, not mere neglect*, to put the oaths required by law, by their threats against challengers, by their allowance of multitudes of illegal votes, as shown not only by the enormous and unexplained increase of the vote, but by the positive proof of illegality in about two hundred individual cases, and all the other circumstances charged by the contestant and declared to be proved by the committee, were not thrown out of the count at all, as stated in the report before us. This is an unaccountable mistake of the fact into which the committee have fallen. It is true that the language quoted from the report in that case, tending to justify the exclusion of polls tainted by fraud, is correctly quoted; but the argument was used only in aid of the legal point that the judges had not been sworn, which brought the case within the recognized congressional precedents. No polls were excluded save those at which the officers were not sworn; and all of these were excluded, although, at some of them, no actual fraud was alleged or proved; and it was upon this

point, as presented not only by the report of the committee, but by the leading members of the House, (see particularly the speech of the Hon. Mr. Stevens, of Pennsylvania,) that the House gave Mr. Blair his seat in the thirty-sixth Congress.

The House cannot sanction the report of the committee in this case, when nothing is alleged in the *notice* of contest but the reception of illegal votes; and nothing more than that, in substance, is alleged or proved before the committee without establishing a most dangerous precedent. We mean not to be understood as saying that a fraud is not alleged in general terms in the report; but we mean to say no specifications are alleged or proved which imply fraud.

3. In what has been said it has been assumed that the statements on which the committee predicate their judgment were sustained by proof; and we argued that no presumption of fraud would attach to the judges even on the assumption that every fact charged was true. Let us now consider the proof in the case, and inquire, first, what individual votes are shown by any proof whatever to be illegal.

It is said by the committee that there is positive testimony that "eighty-eight of the voters, whose names are given, fraudulently cast their votes in a body, without question or precaution on the part of the judges, and the proof is little less conclusive as to many more."

The eighty-eight persons who are here said to have cast their votes in a body, &c., are the fifty-six paroled prisoners and the thirty-two cavalry soldiers, whose names are supposed to be found in the poll; and the identity of the persons is assumed to be established by the identity of their names. This is not the law.—(See 2 Phillips on Evidence, p. 214.) But we waive that point, and proceed to call attention to the recklessness of statement exhibited in this passage.

Here it is said that these eighty-eight men voted in a body, without question, &c., when there is not a syllable of evidence given by any witness as *to the manner* of their voting, whether consecutively or not, or who makes any statement at all as to whether these, or any other voters, were questioned or not; and the only evidence of their having voted at all is the poll-book itself, which contradicts, in the most striking manner, this aspersion on the judges, by showing that the men *did not vote in a body*. The voters are numbered in the order of their votes, and the names in question range from No. 29 to No. 476, (see all the numbers in the appendix,) showing that the votes were scattered throughout the day, and that not more than half a dozen of those voting did so consecutively, at any time.

The committee are mistaken, also, as to the number of those whom they suppose to be affected by what they call *positive testimony*. But twelve names are found on the poll-book which would be claimed to represent the cavalry men of company C, and but two of company E. (See names in appendix.) So that, instead of eighty-eight, there are but seventy which any one could claim as illegal voters.

Another important error of the committee, the bearing of which will appear further on, appears in this statement that Captain Constable had charge of the paroled prisoners. This was not the fact. They were commanded by their own officers, some of whom testify in the case for contestant. Captain Constable was merely a quartermaster, and had supervision only of the laborers, mechanics, teamsters, hostlers, &c., in and about Benton barracks and the corral.

But let us consider the charges made by the contestant, in the order stated by the committee, and in their own language.

They are, *first*, that "they," the judges, "admitted illegal voters to cast their ballots in a body, *without any evidence* that they even administered to a single one the oath required, by law, of non-residents."

What is here said of allowing illegal votes to be cast in a body has already been sufficiently noticed; and we quote the passage to remark on the admission which it contains, that the committee made this charge against the judges of allowing non-residents to vote without being sworn without having *any evidence* whatever before them of the truth of it, but based altogether on the extraordinary propositions that it contains; that it devolved on the sitting member to show *affirmatively* that the proper oaths were administered, and that in the absence of such showing they were authorized to assume that the oaths were not duly administered. The reasoning of the committee appears to be, that as they were satisfied that eighty-eight illegal votes were cast, they were authorized to assume that the judges connived at this abuse, unless the sitting member showed the contrary by affirmative evidence; and hence that they are authorized to assume that the judges did not administer the oaths without having any proof on the subject being before them. Unquestionably, the presumption of law is the other way, and in favor of the judges having done their duty until the contrary is clearly shown, and when it appears from the poll-book that the contestant had friends on the ground all the time, and that he actually examined two witnesses, who were present, for four hours on the morning when the heaviest vote was cast for Mr. Blair, and no such failure is attempted to be proved by them, or by any other witness. No one who reads over the record of the examination, and observes the temper manifested by the contestant throughout the whole of it to expose every irregularity, can believe that if the judges had been open to this charge, it would not have been distinctly and affirmatively proved by him; the presumption of law in favor of the judges is thus confirmed by a circumstance which, independently, would be conclusive of the fact.

The next charge made by the contestant against the judges is, that they "acted as partisans of the sitting member, and, against law, exchanged places with other partisans not authorized to act as judges."

The evidence on which this charge is made is found in the testimony of John M. Reuter: His sixth answer is:

The judges appointed by the county court were Mr. Price, B. Hammersly, and Mr. Carpenter.

Question 7th. Were they not all partisans of Mr. Blair?

Answer. They were. There were only two, I have heard, electioneering in his favor, and these were Messrs. Price and Hammersly; the third, I understood, was a partisan of Mr. Blair's.

Question 8th. Did these three men above named act as judges during the election day?

Answer 8th. Not during the time I was there.

Question 9th. Who acted in the place of either of them?

Answer 9th. Jerry Millspaugh acted in the place of Carpenter.

Question 10th. Who did he support for Congress?

Answer 10th. He electioneered, in the afternoon, for Frank P. Blair.

Question 11th. Who was judge in his place while he was electioneering?

Answer 11th. Mr. Carpenter.

Question 17th. How long were you at the Abbey precinct polls, that day, altogether?

Answer 17th. About two hours—from about seven until nine o'clock.

There is not the slightest warrant in this evidence, taken in its most forcible meaning, for the charge that these men, whilst they were judges, acted as partisans of the sitting member. Contestant did not, in his question 7, charge that they acted as partisans whilst acting as judges; and the witness responds by saying that he had heard two of them electioneering in favor of Mr. Blair, but he does not say, or mean to be understood as saying, that they did so on election day.

As respects the charge that Millspaugh exchanged with Carpenter, whilst the witness does say that he did, his own testimony, just quoted, shows that the witness could not be cognizant of the fact he swears to, for he swears he was only present from 7 to 9 in the morning, and that Carpenter did not act whilst he was there, and there is no proof in the record that he ever acted at all, or was qualified at all.

The next charge is that they "surrendered the voting place to a violent partisan of the sitting member."

The only support for this charge is found in the testimony of the witness just quoted. He says Mr. Elleard destroyed the tickets of Mr. Blair's opponents, and said, "Damn it, we don't want any such tickets round here; we have it our own way here to-day." He also says, page 71, answer 5: "I saw one man put out of the room because he would not vote for Blair."

Question 6. What is his name?
Answer 6. I do not know it; he is an old man.
Question 7. Who put him out?
Answer 7. Charles Elleard.
Question 8. Did you see the commencement of the controversy between Elleard and the man put out?
Answer 8. No, sir; I did not.
Question 9. Do you mean to swear that he was put out because he would not vote for Blair?
Answer 9. I do not know for whom he wanted to vote. I can't say that he was put out because he did not want to vote for Mr. Blair, but because he wanted to vote different.
Question 10. Was not his vote rejected because he was not legally entitled to vote by the judges?
Answer 10. I do not know.
Question 11. Do you know of your own knowledge whether he was a legal voter or not?
Answer 11. I do not; but he was an old man and an American.
Question 12. Had you ever seen him before?
Answer 12. I could not swear that I had; I might have seen him or I might not.
Question 13. Have you ever seen him since?
Answer 13. I think not.

This second example of Reuter's testimony is precisely like the first just quoted, in which it appeared by his statements, made in response to the interrogations of the contestant, that he swore to what he did not know, saying that Carpenter acted as judge in the evening, whilst he testified that he was not there after 9 a. m., and all the time he was there Messrs. Millspaugh, Price, and Hammersly were judges. So on the point now under consideration, he first testifies positively that Mr. Elleard put a man out of the house because he would not vote for Blair; then says he did not know for whom he wanted to vote, or whether his vote had not been rejected because illegal by the judges, and, therefore, removed from the stand by their direction, or indeed anything whatever about the occasion of his removal.

The destruction of the tickets and the profanity of Elleard, to which the committee attach so much importance as to quote his language, if true, are made too much of altogether, as it seems to us. The destruction of the tickets of opponents when scattered about carelessly on tables, as those in question seem to have been, is a common incident of elections, and for that reason the friends of the various candidates commonly retain possession of them, especially at precincts where they are greatly in the minority. That this charge is a mere afterthought of the contestant's is conclusively shown by the fact that he did not allege in his notice that his friends were prevented from voting at this precinct, and by the number of votes actually cast for him—as many, he would pretend now, as he was entitled to receive at the precinct.

This Mr. Elleard, for the purpose of impressing the House with the terrors of his presence at the polls, is described as a race-course keeper, when the proof shows that though he owned the place that had once been a race-course, it was not a race-course at the time in question, and, for aught that appears, had not been since he owned it. It was then a pasture for the horses of the government, and one of the witnesses of contestant, Mr. Bobb, who attended the polls for two hours in the morning and again in the evening, says Mr. Elleard was not at the polls whilst he was there, but was occupied attending to the horses in the neighboring pasture. It would not be difficult to find two or three persons who had refrained from voting at any contested election for fear of being rudely spoken to.

The next and last charge made against the judges is that they "achieved the astonishing result of getting near four times as many votes as were ever before or since polled at this precinct from voters, all strangers to long residents of the district."

The report says, page 5:

"In reply to this evidence, (the contestant's,) the committee do not find in the whole record that the sitting member has taken any testimony to support the legality or fairness of the voting at that precinct, except the testimony of Captain Constable, the same person to whom the watch before referred to was presented, taken in this city after the hearing was commenced, and excluded from the consideration of the committee by a vote of the House. The sitting member has contented himself with relying upon such testimony as to the validity of this vote as could be extracted from the witnesses offered by the contestant by cross-examination, which consisted in statements that there were teamsters and others in the employ of Captain Constable, and others not soldiers, and also employes of the United States at a government corral, a short distance from this voting precinct, who sometimes wear soldiers' clothes, and who were believed to be citizens of St. Louis, and who might have cast this great vote. That they did so no one has testified; but the name of each one of these illegal voters was furnished the sitting member in the notice of contest, and he had sixty days after his answer to take any testimony he pleased as to their right to vote. A record of all the teamsters and employés of the government at Benton barracks, and at the government corral, not soldiers, existed at those places. It could have been compared with the poll-list, and if found there the men themselves were at hand to name their residences in some one of the wards of the district, or others could have testified to the fact if it existed. If these votes came from the sources suggested, the proof it of was so easy that its absence adds weight to the testimony against their legality.

This, in substance, declares that it was only necessary for the contestant to say that all the votes cast at the Abbey precinct were illegal; nay, more; for when it is proved by Pasquier, one of the contestant's own witnesses—and not on cross-examination either, as the committee say, but in reply to questions put by contestant himself—that the large vote complained of was cast by three hundred to three hundred and fifty persons, known to him to be residents in the district, but who were temporarily employed near the poll by the quartermaster—(see extract from the testimony in appendix)—the committee say that will not do. Mr. Blair had notice that these men were all illegal voters; and though Mr. Knox's own witness swears to the contrary, Mr. Blair should have had testimony of his own, and should have verified what Mr. Knox's witness said as to the civilian character of the great mass of these voters by showing their names as such on the rolls of the quartermaster. The proof, they say, was so easy, in regard to this statement, that its absence adds weight to the testimony given against their legality. It is difficult to believe that such reasoning could be adopted by any one not having a foregone conclusion. The committee seem to forget that it is Mr. Knox who has to prove these votes to be illegal, and that his work was not ended when he charged that four hundred illegal votes had been cast for Mr. Blair at this poll, and furnished him with four hundred and eighty names, (the whole poll,) forty-one of whom voted for Mr. Knox himself, "as the names of each one of these alleged illegal voters."—(See specification 1 and list appended.)

On what principle of law or common sense is it that Mr. Blair is required to fortify the double presumption of the legality of the votes cast, arising from, first, their names being on the poll-list, and, second, from the testimony of Pasquier, a witness for contestant, proving them to be qualified voters—testimony which should be decisive for Mr. Blair with every fair-minded man, not only because it is given by a witness of his opponent, who is manifestly candid and truthful, but because the contestant himself could, and unquestionably would, have contradicted it by the rolls of the quartermaster referred to by the committee, if the statement had not been true?

The diligence he has shown in comparing this poll-book with the rolls of paroled prisoners and other organizations, far and near, leaves no room to doubt that he would have produced the quartermaster's roll also if it had not made

against him. The theory of the contestant, which the committee adopt, is, that the vote at the Abbey precinct was swelled by the vote of paroled prisoners.

To countenance this theory, they most unceremoniously allowed Mr. Knox to supersede their officers, and put Captain Constable, a friend of Mr. Blair, in command; and they stuck to the theory, although the contestant, having searched the rolls of the fifteen hundred paroled prisoners, could find but about fifty names to correspond with any at the Abbey poll, and in defiance, too, of the testimony of contestant's own witnesses, pointing out the true and legal source from which the increased vote came, and when it is absolutely certain that the contestant would have confuted his witnesses' statement, if it had not been true, by the rolls of the quartermaster, to which the committee refer.

We have thus considered every ground upon which it is contended that this poll should be excluded, stating them in the language of the committee and quoting the language of the witnesses called to support them, and we believe that no fair mind can read what we have written without being convinced that there is no just ground for excluding the poll from the count. It is apparent, indeed, that the idea of excluding this poll was but an after-thought of the contestant himself, resorted to only when it was manifest to himself that he could not identify a sufficient number of the voters with the paroled prisoners and soldiers, whom he had erroneously supposed had cast the vote, to deprive Mr. Blair of his seat.

Second and tenth specifications and series of muster-rolls, &c.

The second specification charges that Mr. Blair received seventy-eight votes from companies B and K, 32d regiment, which were illegal, because the voters had not resided in the district three months; and in support of this allegation, the contestant offered in evidence the muster-rolls of these companies. The sitting member objected, first, to the authenticity of the rolls offered, and, second, to the competency of the evidence on the question of residence, which was the only question raised by the specification under consideration.

The committee overruled the first objection, but sustained the second, and say (page 8) "that the muster-roll is not evidence of the residence before enlistment of the soldiers whose names it bears. It is not of the slightest consequence to the recruiting service to know the residence of the recruit. The law does not require it to be ascertained, nor does the muster-roll purport to give it, but only the place where the recruit joined for duty or was enrolled."

It might be supposed from this that, as non-residence was the only ground upon which the votes of the companies B and K were questioned, and that as the muster-rolls which constituted the only evidence offered to establish it were declared to be incompetent for that purpose, there was an end to the controversy respecting those votes. Not at all. The contestant claimed the right to impeach them for infancy, and not being members of the companies at the time they voted as such, and offered the rolls as evidence on these points. Mr. Blair objected not only because of the unfairness of making use of testimony in the record to support charges not presented there, even if competent to prove the charges had they been duly presented—it being impracticable for him to get testimony at that stage of the proceedings to meet it—but also because the muster-rolls were not, by law, evidence of the ages of the soldiers, no entry being required by law to be made in them on the subject, as shown by many of the rolls in the record before the committee. (For example see ex. 26, 27, and 28, and a majority of those of the Osterhaus brigade.)

The act of 1862 (12th Statutes, page 502) merely *estopped* soldiers from pleading non-age by requiring that every enlisted man should be deemed and taken by the courts to be at least eighteen years old, whatever the real truth might

be. It required no questions to be asked or oath to be taken from a recruit on the subject of his age when mustered into the service, and no entry to be made on the muster-roll.

Nevertheless, Mr. Blair said if the committee dealt with the subject as Mr. Knox proposed, by striking off the polls the names of such voters as appeared by the muster-rolls to be under age, or whose names were not on the muster-rolls, the result would be to strike off three hundred and four for Knox, whilst if all the voters challenged by name for any reason as having voted illegally for him were stricken off, the number was but two hundred and fifty-eight.

The committee held that all the muster-rolls should be received as evidence on the question of age, but only those dated in 1862 (six in number) should be admissible to prove who belonged to the companies. This, in effect, declares that the muster-rolls shall be evidence for Mr. Knox, but not against him, for the rolls of his voters were dated in 1861, and, for the most part, contained, as already noted, no entry of age, whilst the rolls of Mr. Blair's voters were dated in 1862, and all purported to give the ages of the soldiers. The illegality and unfairness of this decision seem obvious enough without argument.

It cannot require argument, first, to show the House that it is illegal and unfair for a contestant who challenges the legality of some seventy-eight voters on the ground of non-residence to be allowed to have some of their names stricken off the polls, on proof that they are minors, and others on proof that they did not belong to the companies with which they voted; second, that it is illegal to make the muster-rolls evidence of age, when entries purporting to give it happen to be found on them which neither the law, regulations, nor customs require to be made; or, third, that it is arbitrary and unjust to make some half a dozen rolls which happen to be dated in 1862, and which tell against the sitting member, evidence of membership, whilst those dated in 1861, which tell against contestant, are ruled out.

It may be true, as the committee say, that the greater proximity of date of Mr. Blair's rolls makes them, in some measure, better evidence of membership at the date of the election than the rolls of an earlier date which contain the names of Mr. Knox's voters. But this is merely a speculative opinion, and is debatable, as will presently be shown.

The ground on which the committee discriminate in favor of the genuineness of the vote of the Osterhaus brigade on this point (whilst they are obliged to allow that great frauds have been committed in it in other respects than in any other organization which voted at this election) is, that as more time elapsed between the muster and the vote, and during that time the recruiting was going on, it is more probable that the names not found on their rolls were recruits than with Blair's missing voters.

This, however, is but one aspect of the subject. The committee do not consider at all the circumstance which probably accounts for the absence of the large number of Mr. Blair's voters, which occurs in companies mustered in six weeks after the election, to wit, that the members at the date of the election had been rejected at the muster or had obtained substitutes.

Changes from such causes every one familiar with the subject knows to be numerous at such a period in these organizations. To assume now that men did not belong to a company on the 4th of November, when a sworn officer of the law, who took their votes on that day, certifies that they did, in the act of certifying the polls—this, too, without any notice to Mr. Blair that these voters were challenged on that ground at all, merely because some other officers do not report them as mustered into the service six weeks afterwards—seems to us to be most unsatisfactory reasoning. The position of the committee on this point is, in our judgment, indefensible. The muster-rolls are either evidence or not evidence on the point in question; and it is impossible for a mind which holds to legal or logical principles to be satisfied with a decision which makes

these rolls evidence against Blair and not against Knox, grounded merely on the differences in the dates of the rolls. There is no difficulty with the subject on legal principles. The returns of sworn officers must be accepted as *prima facie* evidence on an election question, just as the muster-roll would be on any question connected with military matters; and if, as in the present case, the law authorized certain officers to take a vote of the members of a military organization for civil purposes, the return would be *prima facie* evidence of the qualification of the voters, just as in other cases. That evidence would not be rebutted by a muster-roll, if even the same date, for both might be true; and whilst, as in the present case, none of the muster-rolls purport to give the rolls of the companies on the day of election, the discrepancies between them cannot create the least doubt as to the verity of either. Three votes are stricken from Blair's poll as not found on the rolls of companies B and K, 32d regiment. Joseph P. Newsham was adjutant of the regiment, and for that reason his name does not appear on the roll of his company, K; John Dambach and Charles Suchee, who voted in company K, were members of company B in November, when mustered.

Under the 10th specification, charging non-residence on all and minority on some, with respect to the votes of twenty-six companies, the committee, in the manner above considered, compared the poll-books with the muster-rolls of these companies, and after throwing off from Mr. Blair's poll seventeen names as minors and not members, strike off the names of thirty-two persons returned as "river men"—"which means," say the committee, "as the committee are informed, that the men live upon the river, and kindred employments, without claiming or having a residence in this district."

This information, thus acted on, obtained outside the record, was contradicted by the record itself; for the act of voting showed conclusively that these men *claimed* to reside in the first district; and *we* are informed that the whole landing of the city, and all the boarding-houses where they *lay up* when the boating season is over, are in this district; and that the right of the "river men" to vote in it has never been questioned before, and we certainly think such question comes with an ill grace from a candidate who it appears, on his own testimony, (page 366,) *lays up* every summer, and between times, in Massachusetts, where his family have resided for the last seventeen years, after the courts close in St. Louis. It seems unjust to us, too, to deny the right of suffrage to the hardy men upon whose toil, more than upon that of any other class, is built up the commerce of the city, out of which the contestant derives his livelihood in his occasional visits to the place.

The evidence we have been considering the committee allows to be the only testimony which affects a vote cast for Mr. Blair; but before passing to the consideration of his reply and counter charges, they make some comments on the course of Mr. Eads in this election, giving some countenance to the charges of the contestant, which are sweeping, and therefore meaningless, when made by him, but coming from the committee are better calculated to impress many minds than anything they have said professedly based on testimony. It is upon the testimony of Mr. Hume, the editor of the Missouri Democrat, whose malignant falsehood towards Mr. Blair was developed before to the House, in connexion with the charges of the Hon. Mr. McClurg, that the committee assume that Mr. Eads induced his men to cast many fraudulent votes for Mr. Blair, which could not be traced, and could not, therefore, be deducted from his poll. We will show upon what trival grounds the committee make this grave charge. Hume says, page 57, he came up in the cars from Carondelet, where Eads's boat-yard is situated, in the forenoon. There was a crowd of gunboat men around the polls at Carondelet, out of whom the cars were filled. Saw a man distributing tickets in the cars among men whom he took to be gunboat men. Heard nothing particular, except one man told him they were all for Blow and Blair, and "that

they had succeeded in getting in a good many votes at Carondelet for Blair before the old judge asked them too closely about their residence, how long they had been there, &c., but that he had got too particular, and some of them could not vote at that poll."

Question 16. Where did he say the men principally came from?
Answer 16. From Cincinnati and Louisville, and that they had not been in the State for over three or four months.

It is upon such testimony, and from a most violent partisan, that the committee gravely state as a fact established before them that a large number of men were sent up to the city by Mr. Eads to cast fraudulent votes for Mr. Blair, and this is asserted, too, when by the testimony of Mr. Mann, page 38—a witness for contestant, and *not* a friend of Mr. Blair—it is shown that many of Eads's men lived in the eighteenth district; that not one-twentieth of them were really from other cities, and where, if a fraudulent design must be attributed to Mr. Eads in sending the men to St. Louis, it was far more probable that it was to aid Mr. Blow, in whose behalf he had spoken at the Soulard market, to which place it appeared he had previously paid the fare of his men to hear him. But Mr. Mann testifies positively that Eads connived at no illegal voting, and exercised no undue influence. He endeavored by his public speeches to persuade the men to go for Blair and Blow, but paid the fare of all to the polls, and paid them all wages for the day, whether they voted as he wished them to or not.

It is to be regretted that upon no other grounds than the report of a conversation made by a partisan of the temper of Mr. Hume with some unknown person, the committee should have made such comments upon Mr. Eads's course. The testimony before them shows him to be a most liberal and fairminded gentleman, utterly incapable of defrauding any one; and the whole country knows that to his genius, almost as much as to the valor of Grant and Porter and the men serving under them, we owe the opening of the Mississippi, for those gunboats, so effective in the capture of Forts Henry, Donelson, Vicksburg, Grand Gulf, &c., and in keeping open the river since the capture of those places, are the products of his genius, in a region of country where previously naval armaments were unknown.

Mr. Blair's specifications.

We premise our review of this part of the case by remarking that we cannot agree to the statement of the committee, that the specifications of Mr. Knox and Mr. Blair are alike defective. On the contrary, we assert that Mr. Blair offered no proof not covered by his specifications in the strictest construction, and that he neither asked nor was allowed any latitude. Mr. Blair alone has not been allowed to challenge any voter before the committee not named in his notice, and the ground upon which the vote was charged to be illegal assigned in the most certain and unequivocal manner.

Mr. Knox, on the other hand, has been allowed to challenge a whole poll on the ground of fraud without a hint of such a purpose in his notice, and numerous individual votes have also been stricken off Mr. Blair's poll on the ground of non-membership of the company with which they voted, without a suggestion anywhere that a vote was to be impeached on that ground. Many names have been stricken off his poll for minority, with no other specification than that a portion of certain named persons were minors. For example, he charges that *many* of the voters registered in some twenty-six poll-books, to which he refers, were minors.

The first six specifications of Mr. Blair's relate to the companies of the Osterhaus brigade, composed of the seventeenth, twelfth, and third regiments Missouri infantry, and third and fourth cavalry. From company K, seventeenth infantry, the committee deduct but twenty of the twenty-one votes claimed by

Mr. Blair. Mr. Blair claims to have proved one non-resident voter in company I, of the seventeenth regiment. The witness, in reply to the question, "Do you know where any of the members of company I came from?" says, (page 328,) "I know H. Heller (the man referred to) came from Cincinnati."

Question. How do you know that?
Answer. I know it from what he told me.
Question. When was it he told you so?
Answer. It was in October, '61.

The committee say they "are of opinion that this was not competent evidence to prove in this case that the voter was not at the time of the election a resident of the district." The testimony is distinct that the man said he came from Cincinnati to enlist. This decision means that it is incompetent to prove a man's residence by his declaration, made at a time when it is not a point in issue. This is erroneous. (See 1 Hill & Cowan, notes on Phillips on Evidence, p. 224.)

Mr. Blair claims to deduct twenty-three, the whole vote of company F. The committee allow but one. Three witnesses were examined touching this company—Julius Scher, page 328, Charles Zimmer, page 330, Hugo Golmar, page 331. The first swears that two of the company, Stearnburg and Schaub, came from Cincinnati; that he knew them both there, and that Clemens Graf and Paul Schernman lived in Philadelphia when enlisted, as they told witness. Zimmer, first lieutenant of the company, who resided in first district, and voted for Knox, testifies that he didn't know where any of the company came from, save three, one of whom was Schaub. The captain also knew but three of his company as coming from St. Louis. He mustered forty men for the regiment in Cincinnati, but could not tell the names of one of them. The committee, however, rejected none but Stearnburg's vote, disregarding here again the proof of the declarations of Graf and Schernman, and the strong probabilities against the residence of all save three of the voters of this company, arising from the fact that neither the captain nor lieutenant knew them to be residents. We think three are clearly proved to be non-residents.

From company A Mr. Blair claims ten deductions. The committee report but nine. The tenth man, Sergeant Rothe, we suppose, is not rejected by the committee, because one of the witnesses says he came to St. Louis, and was there a short time before enlisting. The other, however, swears that he claimed Cincinnati to be his home.

From company D, 12th regiment, Mr. Blair claims the deduction of forty-six names. Gustavus Benthe (page 360) testifies that he helped to raise the regiment, and gives numerous details respecting the composition of this and other companies, showing a minute acquaintance with them, and his testimony is confirmed in every point by undisputed proof in the case. He says that every man in company D came from either the first, second, or third wards—all outside the first district. But the captain of the company states (page 332) that his headquarters, or recruiting station, was on Second street, between Spruce and Myrtle streets, and for that reason alone he regards the captain's testimony as conflicting with Benthe's testimony, and therefore rejects Benthe's altogether. But the captain, so far from contradicting Benthe's testimony, confirms it; for, although he says he did little of the recruiting himself, and knew the residence of but three of his men, he says they all came from outside the district, and the committee actually reject these three, although recruited within the district, so that the committee did not really think the only reason they assign for rejecting the forty-three other votes challenged a valid one. How can the House accept and act with confidence upon a report characterized by such facts? Captain Sauer testifies (page 333) that Henry Borno lived in the second ward.

From company C Mr. Blair claims a deduction of twenty-three votes. The captain, first lieutenant, and orderly sergeant, all testify that but few of the company came from St. Louis. The captain and orderly sergeant, on being shown

the poll-list, identify Huffman, Schwartz, Heiner, Betsinger, and Frost (five) as from Illinois; Feldman, Jagler, Lutzer, and Hushkamp (four) as from Camp Cole, near Sedalia. The sergeant testifies further, that Straubbe and Husr were from the southern part of the city—that is, from the second district, and that eleven voters—Nos. 11, 12, 13, 15, 25, 26, 27, 28, 39, 30, and 35—were not members of the company on the 4th of November. The committee reject the first *eleven*, but miscount and call them *ten*. They retain the last eleven, notwithstanding the sergeant testifies positively (page 361) that no such names were on the rolls, or had joined the company, fourteen days after the election, when he returned to his company, because, he says, the first lieutenant had been absent since August recruiting, and the committee seize upon the idea that the lieutenant might have had these men with him, forgetting that they had to be with the company to vote; and yet the committee strike every vote from the poll of Mr. Blair not found on the roll of the company made out six weeks after the election. Strike off three of these votes, and the forty-three of company D, all retained by the committee against their own reasoning, and Mr. Blair is elected, even on their own counts.

From the 5th regiment Mr. Blair claims to have thirty-four votes deducted. He fails, as the committee think, and as we argue, to identify that part of the regiment which voted as company G, recruited in Wisconsin; but the witness does prove that John H. Bottorp was a non-resident. Bottorp's vote should be rejected, and so should those of Henry Hosli and Frank Waters, both of whom are returned as from Bonhomme township. The committee refuse to reject Bottorp's vote, saying, the witness only knew of his non-residence by his telling him. The witness did think that conclusive; but he does not say that this was his only reason for the statement.

The committee ruled out the testimony as to the 3d regiment of the Osterhaus brigade, and properly, we think. They sustain the allegation of Mr. Blair's 10th specification, that the irregularity upon which the canvassing officers rejected the returns from certain companies enumerated by him was not such as to vitiate the returns. This applies to nine of said companies. There was, in fact, no defect whatever, and the only pretence for not counting the votes was, that the returning officers had not *cast them up*.

Recapitulation.

The following is the count of the committee:

The official canvass gives to the sitting member and contestant the following vote:

		Blair.
Official		4,741
To be added from rejected polls		181
		4,922
To be deducted, rejected by committee:		
At Abbey precinct	424	
Company B, 32d regiment, (5 members, 10 not members)	15	
Company K, 32d regiment, (9 members, 16 not members, 1 non-resident)	26	
Company C, 10th regiment, (2 members, 6 not members, 25 river men)	33	
Unassigned, 10th regiment, (river men)	7	
Company C, 7th regiment, (minors)	2	
Company E, 7th regiment, (minors)	4	
Company G, 6th regiment, (minors)	3	
		514
		4,408

	Knox.
Official	4,588
To be added from rejected polls	35
	4,623
To be deducted, rejected by committee:	
At Abbey precinct	41
Company B, 32d regiment, (minor)	1
Company B, 7th regiment, (non-resident)	1
Osterhaus's brigade, company K, 17th regiment, (minors)	12
Osterhaus's brigade, company K, 17th regiment, (non-residents)	20
Osterhaus's brigade, company B, 17th regiment, (non-residents)	29
Osterhaus's brigade, company F, 17th regiment, (non-residents)	1
Osterhaus's brigade, company A, 17th regiment, (non-residents)	9
Osterhaus's brigade, company H, 17th regiment, (non-residents)	2
Osterhaus's brigade, company D, 12th regiment, (non-residents)	3
Osterhaus's brigade, company C, 12th regiment, (non-residents)	10
Osterhaus's brigade, company I, 12th regiment, (non-residents)	26
Osterhaus's brigade, company K, 12th regiment, (non-residents)	11
	*166
	4,457

Plurality for Mr. Knox, 49 votes.

We count thus:

	Blair.
Official	4,741
Added from rejected polls, including 6 minors deducted from company F, 7th regiment	187
Total vote for Blair	4,928

	Knox.
Official	4,588
Added from rejected polls	35
	4,623

	Difference with the committee.	
Deduct from company B, 7th regiment, (non-resident)	1	..
Deduct also from vote in 5th regiment	3	3
Deduct from Osterhaus's brigade:		
Company K, 17th regiment infantry, (non-residents)	20	..
Company B, 17th regiment infantry, (non-residents)	29	..
Company F, 17th regiment infantry, (non-residents)	3	2
Company A, 17th regiment infantry, (non-residents)	10	1
Company I, 17th regiment infantry, (non-residents)	1	1
Company H, 17th regiment infantry, (non-residents)	2	..
Company D, 12th regiment infantry, (non-residents)	46	43
Company C, 12th regiment infantry, (non-residents)	22	12
Company I, 12th regiment infantry, (non-residents)	26	..
Company K, 12th regiment infantry, (non-residents)	11	Total dif. 62
Total deductions		164
Leaving total vote for Knox		4,459

* All non-residents except 54.

Which, deducted from Mr. Blair's vote, leaves 469 majority for Mr. Blair; or allowing that identity of name proves identity of person, and deducting all the votes from Blair which have any resemblance to those of the paroled prisoners, &c., 70 in number, and still Mr. Blair will have a majority of 399.

NOTE.—If the votes of Newsham, Dambach, and Sachse be added to Blair's poll, to which we presume the committee will not object, (see our remarks relative to companies B and K, 32d regiment,) this will reduce Knox's majority to 46. Three of the votes we deduct from Mr. Knox's poll the committee retain from oversight, to wit: those of Hosle and Waters, of the 5th regiment, and Henry Boone, of company D, 12th regiment. Another vote is gained for Knox in company C, 12th regiment, by miscount. This would leave him but 42 majority. If we deduct the 5 non-residents, proved so by their own declarations, to wit: 1 in 5th regiment, 2 in company F, 1 in company A, and 1 in company I, 17th regiment, Knox would have but 37 majority, which would be overcome by allowing the remaining 42 of company D, or the 11 in company C with the 32 "river men," or the remainder of the 32 rejected from companies B and K, 32d regiment, and C, 10th regiment, because not found on the muster-rolls; or these 62 last named would suffice.

Conclusion.

The contestant fails, therefore, if the House should refuse to sanction *the confessedly* erroneous procedure of allowing the contestant to make a charge of fraud against the officers of the Abbey precinct at the hearing not made in his notice; or, allowing the charges against the judges, as they are presented by the committee, to be presented *nunc pro tunc* if the House adheres to precedents; *or, third*, if the House decide that the fraud is not proved; or if the House dissents from the ruling of the committee making the muster-rolls evidence of age and membership of companies, and excluding the votes of the "river men;" or if the House rejects the votes which are clearly shown to have been illegally cast by the Osterhaus brigade.

JOHN GANSON.
JAMES S. BROWN.
D. W. VOORHEES.

The debate on the case in the House was upon the points made in the reports. The House agreed to the majority report (June 10, 1864)—ayes 81, nays 33.

NOTE.—The debate will be found in vol. 52, page 2855. For the report: Mr. Dawes, pages 2850, 2859. Against the report: Mr. Brown, page 2857.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

MCHENRY *vs.* YEAMAN, *of Kentucky.*

The principal allegation of the contestant was, that the election was carried by fraud and force, and that test-oaths were introduced unknown to the laws of the State. The majorities for the sitting member were very large, and the committee, holding that occasional irregularities should not vitiate an election, reported in favor of the sitting member. The House sustained the report.

IN THE HOUSE OF REPRESENTATIVES,

MAY 13, 1864.

Mr. SMITHERS, from the Committee of Elections, made the following report:

That an election was held in August, 1863, in said district, for a representative in Congress, at which there were cast 11,398 votes, of which George H.

Yeaman received 8,311, and John H. McHenry, jr., 3,087, being a majority for the sitting member of 5,224.

The said congressional district is composed of twelve counties, viz: Breckinridge, Butler, Christian, Daviess, Edmondson, Grayson, Hancock, Henderson, Hopkins, McLean, Muhlenberg, and Ohio, and in each of which counties the sitting member received a majority of the votes cast.

On the 22d of September, 1863, the contestant served his notice of contest, specifying the grounds of objection to the validity of the election.

These grounds are, mainly, the issuance of certain military orders by Colonel John W. Foster, Brigadier General Shackelford, and Major General Burnside, in relation to the said election; that the election was carried by fraud and force, and that test-oaths were applied unknown to the laws of Kentucky.

It is not the purpose of the committee to enter into any elaborate investigation of the specific causes alleged, nor to consider whether the military orders thus issued were or were not proper; they were designed to carry out the law of Kentucky, and in no wise to interfere with the freedom of the elective franchise. For a clearer understanding of this purpose the committee refer to the said orders and the proclamation of Governor Robinson, hereunto appended.

The only question in this case is, whether there was an election in the second congressional district of Kentucky? Either the proceeding is wholly invalid, or the sitting member is entitled to retain his seat. There can be no pretence of title on the part of the contestant.

Was George H. Yeaman the choice of the legal voters of the district?

The most satisfactory, and, as seems to the committee, the conclusive answer, is furnished by a comparative statement of the votes cast at this election, and of those for several years preceding. The official vote at the presidential election of 1860 was 15,236; in May, 1861, for delegates to the border States convention, 13,328; in June, 1861, for representative in Congress, 14,665; for governor in August, 1863, 10,652. It is therefore manifest that Mr. Yeaman received a majority of the whole voting population of the district, measured even by the standard of 1860, the largest vote ever cast; so that, upon the hypothesis that its voting capacity had not been reduced by the events of the rebellion, had every person who did not vote from any cause whatsoever cast their votes for the contestant, he could not possibly have been elected.

It will be observed that there is no suggestion by the contestant that illegal votes were cast against him, but only that he was prevented of his election by fraud and intimidation.

But it is not true that the number of votes in the district was as large as it had been at previous elections. It is in evidence by the certificate of Adjutant General Boyle, dated October 9, 1863, that 5,714 men had been contributed by the second congressional district to the army of the United States alone.

How many of these men were present at the election is uncertain; but that a considerable number were absent is admitted by the contestant, who specifies as a ground of complaint that soldiers who desired to vote for him were refused furloughs.

The committee do not deem it necessary, in view of the foregoing facts, to enter into a minute examination of the evidence. That occasional irregularities occurred is true, but in the main the election was quiet, peaceable, and orderly, and by no possible contingency could the majority actually received by the sitting member have been overcome. They therefore recommend the adoption of the following resolution:

Resolved, That George H. Yeaman is entitled to a seat in this house, as the representative from the second congressional district of Kentucky in the 38th Congress.

ORDERS, ETC.

General Order, No. 12. } HEADQUARTERS U. S. FORCES, *Henderson, Ky., July* 26, 1863.

In order that the proclamation of the governor and the laws of the State of Kentucky may be observed and enforced, post commandants and officers of this command will see that the following regulations are strictly complied with at the approaching State election:

None but loyal citizens will act as officers of the election.

No one will be allowed to offer himself as a candidate for office, or be voted for at said election, who is not in all things loyal to the State and federal governments, and in favor of a vigorous prosecution of the war for the suppression of the rebellion.

The judges of election will allow no one to vote at said election unless he is known to them to be an undoubtedly loyal citizen, or unless he shall first take the oath required by the laws of the State of Kentucky.

No disloyal man will offer himself as a candidate, or attempt to vote, except for treasonable purposes; and all such efforts will be summarily suppressed by the military authorities.

All necessary protection will be supplied and guaranteed at the polls to Union men by all the military force within this command.

By order of

JOHN W. FOSTER,
Colonel, Commanding.

W. A. PAGE,
Lieutenant and Adjutant.

Oath to be taken at the election.

I do solemnly swear that I have not been in the service of the so-called Confederate States in either a civil or military capacity, or in the service of the so-called provisional government of Kentucky; that I have not given any aid, assistance, or comfort to any person in arms against the United States; and that I have, in all things, demeaned myself as a loyal citizen since the beginning of the present rebellion. So help me God.

General Order, No. 23. } HEADQUARTERS 1ST BRIGADE, 2D DIVISION, 23D ARMY CORPS, *Russellville, Ky., July* 30, 1863.

In order that the proclamation of the governor and the laws of the State of Kentucky may be observed and enforced, post commandants and officers of this command will see that the following regulations are strictly complied with at the approaching State election:

None but loyal citizens will act as officers of the election.

No one will be allowed to offer himself as a candidate for office, or be voted for at said election, who is not in all things loyal to the State and federal governments, and in favor of a vigorous prosecution of the war for the suppression of the rebellion.

The judges of election will allow no one to vote at said election unless he is known to them to be an undoubtedly loyal citizen, or unless he shall first take the oath required by the laws of the State of Kentucky.

No disloyal man will offer himself as a candidate, or attempt to vote, except for treasonable purposes; and all such efforts will be summarily suppressed by the military authorities.

All necessary protection will be supplied and guaranteed at the polls to Union men by all the military force within this command.

By order of J. M. SHACKELFORD, *Brigadier General, Commanding.*

J. E. HUFFMAN,
Assistant Adjutant General.

Oath to be taken at the election.

I do solemnly swear that I have not been in the service of the so-called Confederate States in either a civil or military capacity, or in the service of the so-called provisional government of Kentucky; that I have not given any aid, assistance, or comfort to any person in arms against the United States; and that I have, in all things, demeaned myself as a loyal citizen since the beginning of the present rebellion. So help me God.

General Orders, No. 120. } HEADQUARTERS DEPARTMENT OF THE OHIO, *Cincinnati, Ohio, July* 31, 1863.

Whereas the State of Kentucky is invaded by a rebel force, with the avowed intention of overawing the judges of election, of intimidating the loyal voters, keeping them from the polls, and forcing the election of disloyal candidates at the election on the 3d of August; and whereas the military power of the government is the only force that can defeat this

attempt, the State of Kentucky is hereby declared under martial law, and all military officers are commanded to aid the constituted authorities of the State in support of the laws and the purity of suffrage, as defined in the late proclamation of his excellency Governor Robinson.

As it is not the intention of the commanding general to interfere with the proper expression of public opinion, all discretion in the conduct of the election will be, as usual, in the hands of the legally appointed judges at the polls, who will be held strictly responsible that no disloyal person be allowed to vote, and to this end the military power is ordered to give them its utmost support.

The civil authority, civil courts, and business will not be suspended by this order. It is for the purpose only of protecting, if necessary, the rights of loyal citizens and the freedom of election.

By command of Major General Burnside:

LEWIS RICHMOND, *Assistant Adjutant General.*

Official: W. P. ANDERSON, *Assistant Adjutant General.*

[By telegraph.]

CINCINNATI, *August* 3, 1863.

Major General H. W. Halleck:

The rebel force under Scott, which I reported having crossed the Kentucky river, is now in full retreat in the direction of Somerset, with Colonel Sanders in close pursuit. A great many mules and horses and over three hundred prisoners have been captured, among these Colonel Ashby. They came into Kentucky to make a diversion in favor of Morgan, and will probably be much damaged before getting out.

A. E. BURNSIDE, *Major General.*

HEADQUARTERS OF THE ARMY, *February* 15, 1864.

Official copy:

D. C. WAGER, *Assistant Adjutant General.*

WAR DEPARTMENT, *February* 16, 1864.

Official copy, respectfully furnished Hon. John H. McHenry, jr., for his information.

C. T. CHRISTENSON, *Assistant Adjutant General.*

Proclamation by the governor.

COMMONWEALTH OF KENTUCKY, *Executive Department.*

For the information and guidance of all officers at the approaching election, I have caused to be herewith published an act of the legislature of Kentucky, entitled "An act to amend chapter 15 of the Revised Statutes, entitled 'Citizens, expatriation, and aliens.'"

The strict observance and enforcement of this and all other laws of this State regulating elections are earnestly enjoined and required, as being alike due to a faithful discharge of duty, to the purity of the elective franchise, and to the sovereign will of the people of Kentucky expressed through their legislature.

Given under my hand as governor of Kentucky, at Frankfort, this 20th day of July, 1863, and in the seventy-second year of the Commonwealth.

J. F. ROBINSON.

By the governor:

D. C. WICKLIFFE, *Secretary of State.*

CHAPTER 509.

AN ACT to amend chapter 15 of the Revised Statutes, entitled "Citizens, expatriation, and aliens."

SEC. 1. ***Be it enacted by the general assembly of the Commonwealth of Kentucky,*** That any citizen of this State who shall enter into the service of the so-called Confederate States in either a civil or military capacity, or into the service of the so-called provisional government of Kentucky in either a civil or military capacity, or, having heretofore entered such service of either the Confederate States or provisional government, shall continue in such service after this act takes effect, or shall take up or continue in arms against the military forces of the United States or the State of Kentucky, or shall give voluntary aid and assistance to those in arms against said forces, shall be deemed to have expatriated himself, and shall no longer be a citizen of Kentucky, nor shall he again be a citizen, except by permission of the legislature, by a general or special statute.

SEC. 2. That whenever a person attempts or is called on to exercise any of the constitutional or legal rights and privileges belonging only to citizens of Kentucky, he may be required to negative on oath the expatriation provided in the first section of this act, and upon his failure or refusal to do so shall not be permitted to exercise any such right or privilege.

SEC. 3. This act to be of force in thirty days from and after its passage.

Passed and became a law, the objections of the governor to the contrary notwithstanding, March 11, 1862.

All papers throughout the State will publish this proclamation and accompanying act until the election, and send bills to the secretary of state.

EXECUTIVE DEPARTMENT,
Office of Secretary of State.

I, E. L. Van Winkle, secretary of state for the Commonwealth of Kentucky, and keeper of the archives thereof, do hereby certify that the above printed copy of the proclamation of Governor Robinson, and an act of the general assembly of Kentucky, is a true copy of the original proclamation and act on file in this office.

In testimony whereof, I have hereunto set my hand and caused the seal of the State to be affixed. Done at Frankfort this 14th day of January, A. D. 1864, and in the seventy-second year of the Commonwealth.

[SEAL.]

E. L. VAN WINKLE,
Secretary of State.
By JAMES R. PAGE,
Assistant Secretary.

The debate in the House was principally upon the question of the alleged military interference. In the course of an argument upon the subject Mr. WADSWORTH, of Kentucky, said:

Now, sir, in common with the colleagues from Kentucky with whom I act on this floor condemning as I do this illegal and arbitrary exercise of military power in the second congressional district of Kentucky, they would not vote, and I should not vote as I expect to vote, in favor of my colleague, the sitting member, if I were satisfied that these orders had influenced the election to such an extent as to give him a majority of the whole vote of the district. We are satisfied that he is the choice of that district; we are satisfied that the party which nominated him, and to which both the gentleman contesting (Mr. McHenry) and the sitting member belonged, had an indisputable control of the district on any fair test, and that the orders were impertinent and unnecessary. We are satisfied that the sitting member received a majority of all the votes of the district, and that that majority was not due to the moral effect of these orders, nor the disgusting military wrongs perpetrated in portions of the district. We believe that he would have obtained a majority in that election if these orders had never been issued; I think he would have received a larger majority; at least I am warranted in coming to that conclusion from my own experience in the same canvass, and belonging, as I do, to the same political organization, pledged to the same unequivocal platform of opposition to the radical measures of the administration, of opposition to the republican party, to a war for the negro, but in favor of the war for the Union; the same platform to which every member of this Congress from Kentucky was pledged, and upon which all of them were elected.

The sitting member stated his view of the law of the case as follows:

I desire now to call the attention of the House to some of the principles involved in this case. In a contested election from the Territory of Michigan, Biddle and Richard *vs.* Wing, in 1826, this house held—

"An election is the act of selecting on the part of the electors a person for an office of trust."

Speaking of referring a case back to the people, it is said:

"This, however, ought not to be done when it is possible to ascertain what the true result has been. The elective privilege is a very important one, and ought to be held in the highest estimation." * * * * "No doubts which are capable of being solved ought to be permitted to operate against them. Indeed, nothing short of the impossibility of ascertaining for whom a majority of votes have been given ought to vacate an election."

In another case coming from Virginia in 1793—Trigg *vs.* Preston—a company of soldiers under the command of Captain Preston, a brother of the sitting member, had a disturbance at the polls; a magistrate was knocked down, blood was spilled, the poll surrounded, and voters kept away. The sitting member had a majority in the whole district of 10 votes instead of 5,224. The committee on account of the disturbance reported against his right, but after a protracted discussion the House confirmed him in his seat.

None will doubt General Burnside's naked legal right and power to declare martial law in his department or any portion of it. The propriety of it or the sufficiency of the reasons that moved him are another question. His power as a military commander was undoubted. Does, then, martial law *per se* make void an election not controlled by it, when the result could not have been otherwise, and when the order specified it was to secure the *enforcement* instead of the suspension of the local law of elections? Admitting any given act or order to be illegal, is the sitting member to be held responsible for it unless he be shown to be *particeps criminis*? If *any* irregularity will make void an election, a candidate seeing his defeat sure might spoil the election by procuring the commission of an irregularity, and thus do by fraud and connivance what he could not do at the ballots. If any order by the military will vitiate an election, no matter what the vote, it is in the power of any administration to perpetuate itself in power by secretly causing some subordinate to issue some *order*, and then, though it had no control over the election, though the sitting member got a clear majority of all the votes in the district, he must *go out* because of this order. So that the question in every case is, Has there been an *election*? Have the people spoken, and what have they said? And this house is the sole and supreme judge of that without any appeal.

On May 30, 1864, the House agreed to the report—yeas 96, nays 26.

NOTE.—The debate will be found in vol. 52, pp 2527-2585.

In favor of the report: Mr. Smithers, p. 2527; Mr. Wadsworth, p. 2535; Mr. Smith, p. 2538; Mr. Harding, p. 2579; Mr. Yeaman, p. 2580. Against the report: Mr. McHenry, p. 2528; Mr. Voorhees, p. 2534.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

TODD *vs.* JAYNE, *of Dakota Territory.*

This case turned upon the question of illegal voting, which was charged on both sides.

A deposition, taken after the time prescribed by the statute for closing testimony, was excluded.

The notice was served upon the sitting delegate *before* the result was declared, the law requiring that it shall be served within thirty days *after* the result of the election has been declared. The committee held that the sitting delegate could waive this defect in the proceedings, and as he did so, he could not avail himself of it afterwards.

Justices of the peace are competent to take depositions in a Territory.

IN THE HOUSE OF REPRESENTATIVES,

MAY 24, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

The election here contested was held at the time provided by the laws of the Territory, upon September 1, 1862, and the board of canvassers, in conformity to law, proclaimed the result to be as follows, (Mis. Doc. No. 27, p. 126:)

Counties.	Todd.	Jayne.
Clay, 1st and 2d precincts	64	66
Yancton	66	66
Todd	24	13
Dakota cavalry	9	11
Cole, 1st and 2d precincts	50	18
Brulé precinct	8	63
	221	237

Majority for Jayne, 16.

The returns from Charles Mix county and Bon Homme county were not included in this canvass, but were rejected by the canvassers. There was a

return received from Kitson county, a few days after the proclamation of the result was made, as follows:

ST. JOSEPH, DAKOTA TERRITORY,
Office of the Register of Deeds, September 5, 1862.

At an election held on the first day of September, A. D. 1862, in the county of Kitson and Territory of Dakota, being the seventh council and representative district of said Territory, the following persons received the number of votes annexed to their respective names, to wit:
For delegate to Congress, J. B. S. Todd had one hundred and twenty-five votes.
For delegate to Congress, William Jayne had nineteen votes.
Certified by me.

CHARLES MORNEAU,
Clerk of the Board of County Commissioners.

Sworn to before me this 13th day of September, A. D. 1862.

JOHN B. BATTIMAN,
Justice of the Peace.

The proclamation by the canvassers of the final result was made November 29, 1862.

The contestant served upon the sitting delegate his notice of contest, (pp. 1, 2, 3,) November 17, 1862, charging the casting of illegal votes for the sitting delegate in the counties of Yancton, Cole, Charles Mix, and Bon Homme, and that other legal votes cast for contestant were not counted for him in Bon Homme and Cole counties, and what is called the Pembina district; that legal voters were prevented from voting for contestant in Charles Mix county by threats and violence, and that a majority of the legal votes of the Territory were cast for contestant.

The sitting delegate answered these allegations (pp. 4, 5, 6) on the 15th December, 1862, with a general denial, and alleging that the return from Charles Mix county should be received and counted, and that illegal votes were cast and counted for the contestant at Big Sioux Point, in Cole county; that the voting district called Pembina is situated wholly in Indian territory, and was by the organic act, for that reason, out of the political limits of the Territory, and no person residing within it was entitled to vote; that a majority of the legal votes cast at said precinct, if any, was cast for the sitting delegate, and that a very large part of the vote returned from said precinct was fraudulent and fictitious, and that a majority of all the legal votes of the district were cast for the sitting delegate.

At the commencement of the session the credentials of both contestant and sitting delegate were referred to the committee, and neither was admitted to the seat. At a subsequent day the committee made a report, (No. 1.) accompanied by the following resolution:

Resolved, That William Jayne, having presented a certificate, in due form of law, of his election as delegate from the Territory of Dakota to the 38th Congress, is entitled to take the oath of office and occupy a seat in this house as such delegate, without prejudice to the right of J. B. S. Todd, claiming to be duly elected thereto, to prosecute his contest therefor, according to the rules and usages of this house.

This resolution was adopted by the House, and Mr. Jayne thereupon took the oath of office, and has occupied the seat pending the contest. Technical objections were raised at the outset, on both sides, that the proceedings had not conformed to the statute of 1851 concerning contested elections. The contestant insisted upon the exclusion of the deposition of Joseph L. Buckman, (p. 154,) because taken after the time prescribed by the statute for closing testimony. By the statute, sixty days from December 15, 1862, the time of the answer, is allowed for taking depositions, which in this case would be February 15, 1863, and they are to be taken in the Territory by some magistrate named in the statute and resident of the Territory. This deposition was taken March 11, 1863, in the District of Columbia, before one of the judges of the orphans' court of this district. The law is explicit, that, while the House can authorise

the taking of depositions after the expiration of the time fixed by statute, yet without such authority the evidence must be excluded. The House has heretofore, in another case, that of Knox *vs.* Blair, instructed the committee to exclude a deposition—that of N. S. Constable, taken in this city under similar circumstances—and this deposition was therefore excluded.

The sitting delegate objected to the proceedings on the part of the contestant, because they also failed to comply with the statute, in this: First, that while the statute requires the contestant to serve his notice of contest upon the sitting delegate within thirty days *after* the result of the election has been declared by the board of canvassers, the notice in this case was served upon him *before* the result was declared. The notice was served November 17, 1862, and the result proclaimed November 29, 1862. The answer of the sitting delegate, which was upon the merits, and without notice of this objection, was served upon the contestant December 15, 1862. And the committee are of opinion that this was a defect which the sitting delegate could waive, and that by answering *after* the result had been proclaimed, and within the time when a new notice of contest could have been served, without availing himself of the objection and proceeding to take the testimony, he had waived the right to object to it at the hearing. The sitting delegate further objected that the testimony of contestant was not taken before magistrates authorized by the statute to take testimony. The depositions appear to have been taken before two justices of the peace, residents of the Territory, who are only authorized to take them when there are none of the other officers mentioned in the statute in the Territory. The statute requires that whoever takes the depositions shall be a resident of the Territory, and the only persons before whom the sitting delegate claims the depositions should have been taken were the chief justice of the Territory, P. Bliss, and associate justice, J. L. Williams. Of their residence in the Territory, the evidence is, (pp. 15, 19, 21, 27, 37, 82,) that their families have never been domiciled in the Territory, but, since their appointment at Sioux City, in Iowa, their post office matter is sent to that city, where they reside, only coming into the Territory to hold their courts, and then returning to their families in Sioux City. Judge Bliss, who was in the Territory when the notice to take the first deposition was given, which was given to take them before him, "or before some other person duly qualified to take said testimony," on Friday, the sixth day of January, 1863, writes to the attorney a note, (p. 10,) in which he says, "I will open the examination and remain as long as I can—at least *till Friday evening*." The committee were of opinion that the two justices of the peace, residents of the Territory, were competent to take the depositions. A voter is to be a white male citizen of the United States, and a resident of the Territory ninety days.

The contestant claims that ten non-residents voted for sitting delegate in Yancton county, (pp. 14, 16, 17.) Their names are D. T. Fessenden, C. Fessenden, A. B. Wood, J. Mellen, Albert Mellen, N. Edmonds, G. W. Lamson, G. N. Propper, Josiah C. Trask, and Sergeant Patrick Conway, of company A, Dakota cavalry. The testimony as to the first five named is, (pp. 14, 16,) that they were surveyors, having contracts to survey land under the surveyor general of the Territory, occupying tents when so employed, and leaving the Territory as soon as their work was completed, to their homes in Michigan and Illinois, where their families resided; that they left the Territory a day or two after the election, and whether they ever returned or not depending upon new contracts, not homes, in the Territory. And although it is testified (p. 152) that they were *residents* of the Territory, yet the character of that residence clearly appears to be as above stated, and the committee did not deem them residents within the meaning of the law, and rejected their votes. It was testified of Propper, (p. 22,) by a person who accompanied him, that he was a resident of Freeborn county, Minnesota, and left there June 16, 1862, for Dakota. He

could not, therefore, be a voter. It was testified of Trask that he resided in Kansas, (pp. 27, 29;) was editor of the Kansas State Journal; said he came to the Territory to bring the printed laws of the Territory, and to settle with the secretary for the printing of the same, and returned a short time after the election, and was killed in the raid upon Lawrence. His vote is rejected. Of Lamson it was testified (pp. 14, 17, 29, 31) that he was a clerk in the surveyor general's office; his family never lived there, but in Michigan; he left the Territory a few days after election for his home in Detroit, and declared he would never bring his family there. His vote was rejected by the committee. There was also testimony of a similar character in respect to Newton Edmonds, but he himself swears (p. 152) that he has resided in the Territory since July, 1861, and he is now there, governor of the Territory, and his vote was not rejected by the committee. Patrick Conway (p. 24) resided, at the time of his enlistment, at St. John's, Nebraska, and enlisted there. The committee, therefore, rejected his vote.

It was not disputed that these nine persons cast their votes for the sitting delegate, and they must therefore be deducted from his count.

BON HOMME COUNTY.

The vote of this county was rejected by the canvassers, and it is claimed by the contestant that there should be counted from this county twenty-six votes for him, and thirteen for the sitting delegate. The evidence shows (pp. 33, 58) that the polls were opened at 9 o'clock in the morning, at the house of G. M. Pinney, United States marshal; Moses Herrick, D. C. Gross, and Jacob Kiel acted as judges. Silas G. Irish was originally appointed by the county commissioners of the county, as the law requires, to act as one of the judges. He was notified of his appointment by Harvey Hartsough, one of the commissioners, and accepted the appointment. A few days after this same Mr. Hartsough, one of the commissioners, came to him and said to him "that he didn't 'care a damn whether we (referring to the Jayne party) had the majority or not; we would swindle them (the Todd party) out of it anyhow.' I replied to Mr. Hartsough, that 'You cannot carry any election that way. As a republican, I was disgusted with this practice of the democrats in Kansas, and that no fraudulent vote should go into that ballot-box unless it walked first over me.' He turned away from me in seeming disgust at my reply. I heard very shortly after that Mr. Skinner was appointed in my place on the election board."

Mr. Skinner was not permitted to serve, however. On the morning of the election he repaired to the polls, before 9 o'clock, as the witnesses think, at any rate before any voting was commenced, and found Jacob Kiel, the servant of this same Harvey Hartsough, and known as the Dutch boy in this county, (p. 38,) installed in his place, and the United States marshal refused to admit Skinner into the room, declaring that Jacob Kiel should act as judge. The voting was done through a window. One witness (Shober) thereupon stationed himself at the window on the outside, and requested the voters to vote open tickets, while he took their names, and those who voted for Todd did so, numbering twenty-five in all, whose names he gives, (p. 34.) And there were fourteen other voters, making thirty-nine in all. A recess of an hour was taken for dinner, and during that time Moses Herrick, one of the judges, took the ballot-box and carried it away with him into a room in his own house by himself. The balloting continued in the afternoon, and at the close of the polls, when the counting commenced, which is described by the witness as follows, (pp. 35, 36:)

The judges proceeded to count the ballots, denying admittance to the electors at the polls. The judges first began the canvass of the votes by taking the tickets from the ballot-box and separating the same into two different piles—the Todd tickets in one pile, and the Jayne tickets in the other. The Jayne tickets were distinguishable from the Todd tickets by their

blotted surface, the ink showing plainly through the ticket. It became at once apparent that a fraud had been perpetrated, by the substitution of ballots during the hour had for dinner. There were at this time about twenty-five persons around the polls, and much excitement ensued. As soon as I saw the excitement, I demanded to be admitted, and to have the canvass made public, which was at that time peremptorily refused by the judges, and by Mr. Pinney, who was their spokesman. During this time Mr. Johnson and myself were standing at the window, directly in front of the judges. Upon this refusal of admission into the room the excitement still increased. The judges thereupon gathered up the tickets and threw them back into the box. I then again demanded admission. After some hesitation, Pinney suggested that myself and Edward Gifford be admitted; we entered together, and went up to Moses Herrick, one of the judges of election, and asked him to proceed with the canvass, which he refused to do. I then asked him to show me the tickets, whereupon he handed me thirty of the tickets to examine. I looked them over in his presence, and found that I was right in my conclusions. I then asked him to show me the other nine of the tickets, which he refused. I found fifteen tickets, among the number handed me, for Jayne. I then laid them down on the table and remarked to Mr. Herrick that there was *prima facie* evidence of fraud; that there had not been fifteen votes cast for Jayne; whereupon the judges and clerks jumped up, under the lead of G. M. Pinney, and left the room, leaving poll-books, ballots, and all papers connected with the election, lying on the table. Great excitement prevailed. The canvass was never completed. The crowd rushed in (p. 159) and took possession of the ballot-box, poll-books, and ballots, and proceeded then to hold a new election.

The committee were of opinion that the conduct of all parties engaged in this transaction was disgraceful and fraudulent, and that no votes should be counted from that precinct.

CHARLES MIX COUNTY.

The returns from this county were rejected by the canvassers. The contestant alleges against this vote (p. 2) that it was wholly illegal, fraudulent, and void, for the reason that one hundred Iowa soldiers and eleven half-breed Indians voted for the sitting delegate, and that violence and threats were used to keep away from the polls the friends of the contestant. The testimony of contestant upon this vote is to be found upon pages 60 to 82; that of sitting delegate upon pages 124 to 152. It is admitted by the sitting delegate that the Iowa soldiers were not entitled to vote; but he claims that four of the half-breeds whose names are found on the poll-book have been made citizens by special act of the territorial legislature, (private laws, 1st session, p. 1,) and were, therefore, entitled to vote.

The committee were of opinion that the allegation of threats and violence at the polls was not sustained by the evidence, and they saw no reason, if it could be ascertained by the evidence how many Iowa soldiers and half-breeds not legal voters cast their votes at this precinct, why the balance of the vote should not be counted. From the poll-book of the precinct (p. 111) it appears that one hundred and forty-five votes were cast: for the sitting delegate one hundred and thirty-eight, and for the contestant seven. Of the Iowa soldiers several were examined as witnesses—some of them voting at the time, and some not. The poll-book was produced, and the names upon it examined by them. Their testimony as to the number of Iowa soldiers who thus voted will be found, (pp. 63, 65, 66, 73, 76, 77, 78, 79,) and is generally concurrent that there were seventy who thus voted. One testifies (p. 63) to the number seventy-eight, two others at seventy, (pages 73, 76;) all others below seventy, (pages 65, 66, 73, 77, 79.) The committee have, therefore, rejected seventy votes of Iowa soldiers. As to the number of half-breeds who voted at that precinct, witnesses testify—one (page 63) that there were sixteen, one (page 67) that he recognized the names of four, and then (page 68) six, and another (page 71) ten. The evidence satisfied the committee that there were ten half-breeds, at least, who voted at that precinct, of whom four were made citizens by statute. They rejected the other six votes. Nothing within the allegation was proved against any other votes. The poll of this county is thus reduced to sixty-nine votes.

It was also testified (page 147) that about sixty persons voted who were not soldiers, and forty-nine of them are named as known to the witness to be voters, (page 148.) From fifty to sixty, and fifty-six, are named by another witness as known to him to be legal voters, (pages 148, 149.) The committee are, therefore, of the opinion that the remaining vote of this county, after deducting that of the Iowa soldiers and half-breeds named, should be counted, giving to the sitting delegate sixty-two votes, and to the contestant seven.

BRULÉ CREEK PRECINCT.

The contestant, in his notice of contest, alleges (pages 2–4) that the election at this precinct was fraudulent and void, because the polls were opened in the night previous to the election, at a place not provided by law, and a large number of votes of persons not qualified to vote there polled, and that subsequently, without opening or examining the box, the polls were again opened at 9 o'clock on the day of the election, without qualification of the judges or clerks, and the votes then received were placed in the box with those received during the night, and all were counted together. The vote returned and counted from this precinct was for the sitting delegate sixty-three votes, for the contestant nine votes. The testimony of contestant to sustain this allegation is found, pages 82–112. The sitting delegate furnishes testimony in reply, (pages 152, 153, 154.)

The place fixed according to law for voting was at the house of A. K. Phillips, one of the judges of the election. But it appears from the testimony (pages 84, 86, 90, 91) that the judges met at the house of one Timothy Andrews, about midnight previous to the day of the election, and there by candlelight received forty-one votes of persons who had not resided in the Territory ninety days, and some of them unnaturalized foreigners who had been in the country but a short time. All these votes were cast for the sitting delegate. The man at whose house this voting took place, and who had been in the Territory less than two months, (page 84,) was called out of bed to vote, and did vote about two o'clock in the morning. His own son was at the time acting as judge of the election. One man, while he was present, voted for another who was not present, stating his name and absence to the so-called judges.

Two or three persons from the adjoining county (p. 91) were present actively engaged in distributing votes for the sitting delegate, and quieting the scruples of those who cast them; and it was openly urged that they "had better vote early, as, when the regular hour for opening the polls should arrive, there would be men present who would challenge voters, and we, who had not been here ninety days, could not vote." One man was seen to vote three times; twice under assumed names. Foreigners, who had not been in the country but a few months, were made to believe, by some ceremony there performed, that they thereby became naturalized citizens, and they then voted, (pp. 102, 105.) The following certificate was then given to one of them by a man by the name of Glaze, who was then present urging men to vote:

I, Ole Thompson, do declare upon oath that it is *bona fide* my intention to become a citizen of the United States, and to renounce forever all allegiance to any foreign prince, power, potentate, state, or sovereign whatsoever, and particularly to Carl XV, of whom I was last a subject.

OLE THOMPSON.

Subscribed and sworn to before me this 28th day of August, A. D. 1862.

A. V. ECKLES, *Clerk.*
By JOHN B. GLAZE, *Deputy.*

There were forty-two votes polled in this way at the house of Timothy Andrews at dead of night, and before 2 o'clock in the morning, (p. 84.) At 9 o'clock the next morning the same judges proceeded with the same ballot-box to the house of A. R. Phillips, and there, with the same box, with these ballots

in it, (p. 109,) polled twenty-nine other votes—making the whole number certified seventy-one. When these twenty-nine votes had been polled, and the names of the voters recorded, one of the judges insisted that the clerk of election should add the list of names of persons who had not voted while that clerk had been present, but which list was furnished to the clerk by the judges; but the clerk refused and resigned, and another was put in his place, and the forty-two names of the voters in the night-time were added, (p. 87,) not one of whom was a legal voter.

Whether the judges and clerks were sworn or not does not clearly appear. There is a certificate of their qualification appended to this poll, (p. 106;) but, although the proceedings from beginning to end are testified to by several eye-witnesses, no one has mentioned the fact of their being sworn; and one of the judges, when the question is put directly to him, (p. 109,) "Were the judges of election and clerks sworn at said election?" refuses to answer. The whole testimony of this judge of election is so brazen-faced and unblushing that the committee give it entire:

My name is Thaddeus Andrews; I reside at Brulé Creek, Cole county, Dakota Territory I was present at the election held at the Brulé Creek precinct on the first day of September, 1862. I was one of the judges of election at said precinct.

1st interrogatory. Were the judges of election and clerks sworn at said election?

(Witness refuses to answer.)

The polls were opened at said election at the house of A. R. Phillips, at Brulé Creek aforesaid. They were opened at about 9 o'clock in the morning, on the first day of September, 1862. The judges and clerks were present at said election. One of the judges who was appointed by the commissioners refused to serve, and A. R. Phillips nominated Milton M. Rich, who was elected by the persons present in the house; I do not recollect the number present. I think there were about forty votes cast during the day, after the polls were opened at 9 o'clock a. m.

2d interrogatory. Was the ballot-box opened and examined before the voting commenced, after the polls were opened at 9 o'clock a. m. on said day?

(Witness refuses to answer.)

I should think there were ballots in the ballot-box before the voting commenced after the polls were opened; there were about thirty ballots in the box when the polls were opened. I cannot tell for whom the ballots were cast, but I suppose that they were cast for William Jayne for delegate to Congress. They were cast for the south half of the northeast quarter of section No. 29, township No. 92 north, for county seat. These ballots were put in the ballot-box by some person; I am unable to state by whom. The ballots were put in between Sunday evening and 9 o'clock Monday morning; I think about 3 o'clock Monday morning. I think they were put in at A. R. Phillips's house, but I am not sure that that was the place. I was present at the time they were put in; there were quite a number around while this was going on.

3d interrogatory. Do you not know that those ballots were put in the ballot-box at the house of Timothy Andrews?

(Witness refuses to answer.)

I cannot state whether the ballots that were in the ballot-box when the voting commenced were all put in by one man or not. The polls were closed about 6 o'clock. After the polls were closed we commenced canvassing the votes publicly. We counted all the ballots in the ballot-box. We found that the number of ballots in the box did not agree with the number of names on the poll-list. There were six ballots more in the box than there were names on the poll-list. Six ballots were then picked out from the top of the ballots in the box, which were destroyed; the remainder of the ballots we then canvassed, and returned them to the office of the clerk of the board of commissioners of Cole county. The names of persons voting during the day were taken down by the clerks of the election. There are names of persons upon the poll-list who did not vote during election day. I think there are about thirty names on the list who did not vote.

4th interrogatory. How came those names on the poll-list?

(Witness refuses to answer.)

One of the poll-lists was returned to the clerk of the board of commissioners. The clerks of the election were Mahlon Gore and William C. Betts; the judges were myself, A. R. Phillips, and Milton M. Rich.

THADDEUS ANDREWS.

The committee are of opinion that it would be a disgrace to receive a return of votes from persons assuming to act as judges and guilty of such practices in

office as the testimony and the foregoing unblushing confession disclose, and submit whether such "*judges*" have or not added to their other crimes that of perjury in taking the following oath, which they have certified that they have taken:

We do solemnly swear that we will perform the duties of judges according to law and the best of our ability; that we will studiously endeavor to prevent *fraud* and *deceit* in conducting the same.

The committee, therefore, reject the entire vote thus returned from this precinct.

KITSON COUNTY.

This is the vote commonly known as the Pembina vote. It was received at the secretary's office a few days after the canvass was completed, and was not included in the result. The following is the certificate of the vote:

ST. JOSEPH, DAKOTA TERRITORY,
Office of the Register of Deeds, September 5, 1862.

At an election held on the first day of September, A. D. 1862, in the county of Kitson and Territory of Dakota, being the seventh council and representative district of said Territory, the following persons received the number of votes annexed to their respective names, to wit:
For delegate to Congress, J. B. S. Todd had one hundred and twenty-five votes.
For delegate to Congress, William Jayne had nineteen votes.
Certified by me.

CHARLES MORNEAU,
Clerk of the Board of County Commissioners.

Sworn to before me this 13th day of September, A. D. 1862.

JOHN B. BATTIMAN,
Justice of the Peace.

DAKOTA TERRITORY, *Secretary's Office.*

I hereby certify that the foregoing is a true and correct copy of the original abstract returned to this office and now on file in my office; and I further certify that Charles Morneau was, at the date of said returns, a register of deeds in and for the county of Kitson, and also that John Battiman was at the said date a justice of the peace in and for said county of Kitson, and that said returns were received.

In testimony whereof, I have hereunto subscribed my name, and affixed the great seal of the Territory.
Done at Yancton this 12th day of January, 1863.

JOHN HUTCHINSON,
[SEAL.] *Secretary.*

The committee were of opinion that the arrival of these returns in the secretary's office a few days after the canvass was completed was not of itself sufficient ground for their rejection. The sitting delegate objects to the counting of this return for two reasons. First, that the vote is fraudulent and fictitious. Second, that the territory included in the precinct at which this vote was cast "is situated wholly in the Indian country; and though within the geographical, it is, by the act of Congress organizing the Territory of Dakota, without the political limits of said Territory," (p. 5.)

To sustain the allegation that the vote was fraudulent and fictitious, the sitting delegate offered no other evidence except the deposition of Joseph L. Buckman, (p. 154,) which being taken after the time for taking depositions had expired, was, for the reasons heretofore stated, excluded. The second point rests upon a mistaken construction of the following proviso in the first section of the organic act organizing the Territory: "*Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which *by treaty* with any Indian tribe is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction

of any State or Territory; but all such territory shall be excepted out of the boundaries and form no part of the Territory of Dakota until said tribe shall signify their assent to the President of the United States to be included within said Territory." Now it is apparent, upon the reading of this proviso, that the territory which it is therein provided shall be set apart for any particular tribe of Indians, and thereby to be excepted out of the limits of the Territory, is that which is so set apart by treaty with any particular tribe, and is so excepted by the treaty itself. It does not apply to any portion of the territory upon which Indians may happen to live, but only such portions as are held by particular tribes under and by virtue of treaties defining boundaries, and stipulating for exclusive jurisdiction to be exercised by the tribes holding them. No such treaty existed covering any portion of the election precinct under consideration, and therefore the vote there cast cannot for this reason be excluded. It only remains to state the result to which these conclusions have led the committee. The official canvass stated the result to be—

	For William Jayne.	For J. B. S. Todd.
	237 votes.	221 votes.
Add to this Charles Mix county.....	62 votes.	7 votes.
Add to this Kitson county	19 votes.	125 votes.
	318 votes.	353 votes.
Deduct Yancton non-residents..... 9		
Deduct Brulé precinct..... 63	—72 votes.	8 votes.
	246 votes.	345 votes.

This result gives to the contestant a majority of ninety-nine votes, and the committee accordingly recommend the adoption of the following resolutions:

Resolved, That William Jayne is not entitled to a seat in this house as a delegate from the Territory of Dakota in the 38th Congress.

Resolved, That J. B. S. Todd is entitled to a seat in this house as a delegate from the Territory of Dakota in the 38th Congress.

Subjoined are the views of the minority in this case:

That the right to a seat in this case should be settled either upon strictly legal principles, holding each party to the law, or upon the merits, without regard to mere technicalities, and the seat awarded to the person really shown to have received the greatest number of legal votes, would seem to be a self-evident proposition. Yet the majority of the committee in their report do neither of these things. They confessedly depart from the requirements of the law in behalf of the contestant, while they hold the sitting delegate strictly to the law. The House at an early day decided "that William Jayne, having presented a certificate, in due form of law, of his election as delegate from the Territory of Dakota to the 38th Congress, is entitled to take the oath of office and occupy a seat," &c. This decision of the House, made the 15th day of January, 1864, settled the right of the sitting member to the seat upon the strictly legal formal returns, and having been admitted, he could only be deprived of the seat by the showing of the contestant that the formal returns were incorrect. This he has attempted to do. At the outset the question arises, is there any law prescribing the mode of obtaining evidence in the case of contested elections of delegates from Territories? Manifestly not, if the act of February 19, 1851, is to receive a strict construction, for it applies only in terms to the "contest of an election of any

member of the House of Representatives." That a territorial delegate has no vote, and is not, strictly speaking, a member of the House of Representatives, is known to all. If, however, the act of February 19, 1851, is by analogy to be held as governing in the contest of a seat by a territorial delegate, the provisions must be complied with. That they were not complied with by the contestant in this case is admitted by the majority report, which states, "that while the statute requires the contestant to serve his notice of contest upon the sitting delegate within thirty days *after* the result of the election has been declared by the board of canvassers, the notice in this case was served *before* the result was declared." The report, however, proceeds to state that "the committee are of opinion that this was a defect which the sitting delegate could waive, and that by answering after the result had been proclaimed," &c., "he had waived the right," &c. Without controverting this position it is difficult to perceive why, if the contestant is to be permitted to avail himself of a notice not strictly in accordance with the statute, the sitting delegate should not have the like liberality extended to him in relation to a deposition taken on notice to the contestant, when the contestant was present listening to the examination and consenting to an adjournment for the purpose of completing it. There is, however, a more serious objection to all the contestant's testimony. It is all *ex parte*, and taken before justices of the peace. By the 3d section of the act of Congress, the party wishing to take testimony may apply to "any judge of any court of the United States, or to any chancellor, judge or justice of a court of record of any State, or to any mayor, recorder, or intendant of any town or city in which said officers shall reside, within the congressional district;" and by a subsequent section, the 23d, it is provided that in case no such magistrate as is by the 3d section authorized to take depositions shall reside in the congressional district, it shall be lawful to apply to two justices of the peace. In this instance the contestant gave notice of his intention to take testimony before the chief justice of the Territory, but subsequently went before two justices of the peace. The sitting delegate protested against the right of the justices of the peace to take the testimony, and never appeared before them. The contestant seeks to show, by testimony, that Judge Bliss, the chief justice of the Territory, resided at Sioux City, Iowa, and not within the Territory of Dakota; but the notice which he gave to take the testimony states: "It is my intention to examine witnesses before Hon. P. Bliss, chief justice of Dakota Territory, the said chief justice being a *resident within and for the congressional district, Territory of Dakota*," thereby admitting his presence and competency to act. A copy of said notice is hereto annexed. Besides, the papers show that Judge Bliss, at the instance of contestant, issued subpœnas for witnesses, was present at the time the testimony was about to be taken, and proposed in writing to the contestant to enter upon the examination. The contestant, however, preferred, contrary to law, to proceed before two justices of the peace. That Judge Bliss was in contemplation of law a resident of the Territory is manifest, from the fact that he had been in the Territory holding the courts, and was then present. The fact that his family had not come to the Territory could not make him a non-resident. The organic act required his *residence* in the Territory, and in accordance with it he had gone to the Territory and held his courts. It was his residence at the very time, *in fact*, as well as law. Will it be said that the judges of Dakota, when in the Territory, were not sufficiently domiciled there to take depositions, although they might hold courts? If Judge Bliss was not competent to take the depositions in this case by reason of his non-residence, clearly he was not competent to hold court, and all the proceedings of himself and associate justices in holding courts in Dakota are *coram non judice* and void. Will the House make a decision fraught with such consequences? If not, then clearly, there being a United States judge in the Ter-

ritory competent to take the testimony, there was no authority to take it before two justices of the peace.

Again: even if Judge Bliss was disqualified, still, justices of the peace would not be authorized to act if any of the other officers named in section 3 of the act of Congress were resident in the Territory, and the papers wholly fail to show that there may not have been many such officers. All the contestant attempts to show is that there were no other officers resident of Yancton county; *non constat* there may have been, as there were many such in other counties.

In the double view, therefore, that Chief Justice Bliss was present, ready and competent to act, and that there may have been and were other officers in the Territory qualified to act, the taking of the testimony by the contestant before justices of the peace was not warranted by law; and if the law is to be observed, all the testimony of the contestant must be excluded.

The return from Kitson county, known as the Pembina vote, and situated wholly within the Indian country, is not a copy of "the abstract of votes given in this county," made by the clerk, with the assistance of two justices of the peace, as required by the territorial laws, ch. 32, secs. 28, 31 and 33, but a mere certificate of the clerk; and, moreover, it was not received till after the time limited by law when returns could be received, and the canvass had been completed, and, therefore, if the law is to be observed, could not be received; and this would leave the sitting delegate entitled to his seat as proclaimed by the canvassers. But the majority of the committee admit the Pembina vote, notwithstanding it was not in accordance with law nor received within the time limited by law, and refuse to admit the testimony taken on notice and when the contestant was present, showing the Pembina returns to be fraudulent, because the sitting delegate did not take the testimony before the proper officer and within the proper time. Time is held to be immaterial by the majority, for the purpose of admitting the Pembina returns, and material for the purpose of excluding the testimony to show those returns fraudulent. So the letter of the law is departed from to bring the case of a delegate within the act of Congress, to make valid the notice of contest given before the canvass was declared, to receive the testimony taken without authority before justices of the peace, and the Pembina vote not returned within the time or according to law—all these departures being for the benefit of the contestant; but when a departure from the strict letter of the law would have admitted the testimony impeaching the Pembina vote, and been for the benefit of the sitting delegate, the letter is insisted upon and the testimony excluded. On what principle can such inconsistency be sanctioned?

Without going over the voluminous *ex parte* testimony taken by the contestant, it fails to show, according to the majority report, that Todd received more legal votes than Jayne, exclusive of the Kitson county, or Pembina, return. Leaving out that vote which was returned—125 for Todd, and 19 for Jayne—and making all the corrections allowed by the majority of the committee, Jayne is still elected by seven majority. The right to the seat then depends, according to the majority report, on the Pembina vote. That vote is admitted not to have been returned within the time required by law, nor is there any such return as the law requires. Shall it then be received? If the House decide that the arrival of these returns after the canvass was completed, and the time for their reception had by law expired, and when they are not certified as the law requires, is not a sufficient reason for their rejection, will it not also, upon the same principles of equity and justice, decide that the fact that the testimony taken by the sitting delegate to show that vote fraudulent and fictitious at a time and before a different judge from the one specified in the law, is not a sufficient reason for its rejection? To be consistent and do justice, such must be the decision. This is a question affecting the rights of the people of Dakota, as well as the persons claiming to represent her, and they have a right to insist that returns not made

in accordance with their laws should be rejected, or, if received, that the testimony showing their invalidity should be received also.

The certificate from Kitson county shows:

For Todd	125	votes.
For Jayne	19	"
Total	144	"

What is the evidence in regard to this vote?

First, the census, taken about a year previous, showing that in the whole Red river country there were of white males but fifty-one, and of these over the age of twenty-one but forty-two. Then the testimony of Joseph L. Buckman, taken March 11, 1863, before Hon. W. F. Purcell, judge of the orphans' court in the District of Columbia, on notice duly given, both parties being present at the examination, the contestant, however, under protest, and objecting to the jurisdiction of Judge Purcell to take the testimony. This testimony (see pages 154, 155, and 156) shows that there were but six white persons, native-born and naturalized, present at the place of voting in Kitson county on election day, who were entitled to vote at the precinct on the day of election. The witness had been an Indian trader and postmaster at Pembina for several years; was well acquainted, and swears that he does not think more than ten or twelve white persons were present on the day of election, and of those there were but three who were native-born citizens of the United States, and three others who claimed to be naturalized, and none who had made declaration of their intention to become citizens. He says forty-six or forty-eight votes were cast for delegate at the election; that the excess over the number of legal voters present was cast by illegal voters, mostly half-breeds, and that there was added to the votes cast, after the close of the polls, a little over a hundred votes; and also that Charles Morneau, who was clerk of the board of county commissioners, and sent his own certificate, and not a copy of the abstract, as required by law, to the secretary of state, was present at this election. The testimony of Buckman is unimpeached, and is corroborated by the fact of the census returns showing only forty-two white males over twenty-one years of age in the whole Red river country a short time previous; also by the recent action of the territorial legislature of Dakota, abolishing the district as a voting precinct, on account of its being Indian country and almost wholly uninhabited by white persons, who alone, if possessed of the other qualifications, are by law entitled to the right of suffrage. Can it be that the House, adhering to the letter of the law as to the time and officer before whom testimony shall be taken, when the act itself is only declaratory, and does not forbid the taking of testimony at another time and before another officer, will exclude testimony which exposes this fraudulent and fictitious Pembina vote, and then admit the contestant to take his seat under it? Has not every member at all acquainted with the Red river country a general knowledge that there could be no such vote there as has been certified to? Without this fraudulent vote the contestant has no claim to the seat, as the report of the majority admits, and not only admits this, but shows by the computation of the majority, as given therein, that the sitting member is entitled to retain his seat.

G. W. SCOFIELD.
CHARLES UPSON.

In reference to the Pembina vote Mr. DAWES said:

The committee also counted the Pembina vote. It was received a few days after the time required by law. This vote, according to the certificate, was 19 for Jayne and 125 for Todd. And it was on the question whether this vote should be received that there was any material difference of opinion, as I understand, among the members of the Committee of Elections. It was the opinion of a majority of the committee that it should be received and counted, and

of the minority that it should not. The minority gave their reasons why it should not be received. They gave them in the views which they have reported; and I have no doubt that they will enforce them.

It seems now to be claimed that this vote should not be received because the return was not in conformity to the law, inasmuch as the law requires the certifying officer to certify to an abstract of the vote.

Mr. HUBBARD, of Iowa. I would inquire of the gentleman from Massachusetts whether there is any evidence of the votes of that county having been canvassed according to law.

Mr. DAWES. I will read the certificate:

"ST. JOSEPH, DAKOTA TERRITORY,
"OFFICE OF THE REGISTER OF DEEDS,
"*September* 5, 1862.

"At an election held on the first day of September, A. D. 1862, in the county of Kitson and Territory of Dakota, being the seventh council and representative district of said Territory, the following persons received the number of votes annexed to their respective names, to wit:

"For delegate to Congress, J. B. S. Todd had 125 votes.

"For delegate to Congress, William Jayne had 19 votes.

"Certified by me.

"CHARLES MORNEAU,
"*Clerk of the Board of County Commissioners.*

"Sworn to before me this 13th day of September, A. D. 1862.

"JOHN B. BATTIMAN.
"*Justice of the Peace.*"

"DAKOTA TERRITORY, *Secretary's Office.*

"I hereby certify that the foregoing is a true and correct copy of the original abstract returned to this office and now on file in my office; and I further certify that Charles Morneau was, at the date of said returns, a register of deeds in and for the county of Kitson, and also that John Battiman was at the said date a justice of the peace in and for said county of Kitson, and that said returns were received.

"In testimony whereof, I have hereunto subscribed my name and affixed the great seal of the Territory.

[L. S.] "Done at Yancton this 12th day of January, 1863.

JOHN HUTCHINSON, *Secretary.*"

I was about to say this, that the objection which seems to be raised for the first time is that this certificate does not set forth that this man took with him two justices of the peace to examine these votes, and then to make an abstract of them. It does not say that he took two justices of the peace, but the law presumes that every officer conforms to the law until the contrary is shown. The law does not say that that should be shown in the certificate; but the law does say that he shall certify an abstract. I think the objection was that instead of certifying the whole of the vote he ought to have certified an abstract of the vote. I think it may be claimed that the two justices of the peace were present, for every man will agree that the law presumes an officer has discharged his duty until the contrary is shown. The question is whether the full vote is as good as an abstract. The committee have said over and over again, and my learned friends on this committee have joined in the report, that a certificate is as good without an abstract as with it. It seems to me that that decision is founded in good sense. We have the number of votes, which is the fact sought for. It is as good in one form as another, so far as the committee is concerned.

I do not propose to go through with a criticism of the whole of the minority report until it has been supported by the gentleman who made it.

There was another objection in the report of the minority to the reception of this vote; and that was that it was fraudulent. They depend on the testimony of a witness by the name of Buckman. The majority of the committee rejected the testimony of this man Buckman, as it has ascertained that it was taken in this city some considerable time after the time prescribed by the law for taking testimony in this case. In the Missouri election case passed on this morning the House directed the committee to exclude testimony taken in this city after the time had expired according to the statute for taking testimony. The question was presented to the committee whether they would reject the testimony of Captain Constable in the case of Knox *vs.* Blair, which the House ordered to be excluded, and receive this deposition taken under precisely the same circumstances. The committee came to the conclusion that they would treat both depositions alike. The gentlemen who have signed the minority report agreed that the deposition of Captain Constable should be excluded, and for the same reason the committee think that this deposition of Mr. Buckman should be excluded.

Excepting this, there was nothing before the committee that raised any suspicion of the validity of this certificate, except the suspicion of two or three years ago, when Pembina was in Minnesota, that there was a good deal of fraud there. I always thought there was myself. But the reason that induced the committee to reject the testimony of this witness was the same

as that which operated to the exclusion of testimony taken in precisely the same way in another case, that of Knox *vs.* Blair. The result of this election is properly stated in the report of the majority of the committee—for Todd, 345 votes; for Jayne, 246 votes; making a majority of 99 for Todd. If the deposition of Buckman be received and taken to be true, and if the Pembina vote be rejected, Jayne would have received a majority of 7 votes according to that calculation of the committee. I think the case is narrowed down to the question whether the deposition of Buckman shall be received or not. Beyond that is the question of credibility, upon which the committee thought the evidence was against the credibility of Buckman.

Mr. UPSON, of the Committee of Elections, remarked as follows:

I believe the chairman of the committee in making his estimates, outside of Kitson county, has proceeded, on the whole, with fairness and impartiality, and I will take up their report only as to the Pembina vote.

There appears to me to be an absurdity and inconsistency on the part of the majority of the committee in admitting evidence taken on behalf of the contestant not in accordance with law, and rejecting testimony taken on the part of the sitting member because it was not technically in compliance, as to time, with the law of 1851.

The testimony on the part of the contestant was taken before two justices of the peace, which, as I will show, was in violation of the law of 1851. The gentleman from Wisconsin, [Mr. Brown,] I believe, holds that the law of 1851 is not strictly applicable to the election of delegates from the Territories, and admits that the depositions taken by the contestant are outside of and independent of that law, and in accordance with the practice prior to its adoption; but he nevertheless excludes a portion of the evidence of the sitting member by uniting in the report of the majority. I have said, however, that this testimony on the part of the contestant was taken before two justices of the peace, and in violation of the provisions of the act of 1851. Now, under that law, before evidence can be taken before two justices of the peace, it must first be shown that there are no other officers entitled to take such depositions in the Territory. The law of 1851, in the third section thereof, designates as the proper officers before whom to take depositions, in the first instance, "any chancellor, judge, or justice of any court of record, or any mayor, recorder, or intendant of any town or city." Now, the contestant does not produce a particle of proof that there were none of these officers in the Territory at that time. The law to which I refer, as to justices of the peace, is as follows:

"SEC. 10. When no such magistrate as is by the third section of this act authorized to take depositions shall reside in the congressional district from which the election is proposed to be contested, it shall be lawful for either party to make application to any two justices of the peace residing within the said district, who are hereby authorized to receive such application and jointly to proceed upon it in the manner hereinbefore directed."

Making it a preliminary requisite that the party must show non-residence or non-existence in the Territory of the other officers before whom the depositions are first to be taken. This objection was made by the sitting member at the time that these depositions were taken. He appeared in the first instance and insisted on his legal right to have depositions taken before those officers first specified in the law to be called upon, and this objection appears in the record. The whole evidence, also, in this case on the part of the contestant is taken *ex parte*, without any appearance on the part of the sitting member, except to enter his objection to the whole proceeding as illegal, and is without the cross-examination of a single witness. I ask what may not be proved under such circumstances? I am not surprised at some of the evidence that has been brought in here against the sitting delegate, and made the ground of personal assault upon him, because the witnesses were sworn and testified without any cross-examination. The contestant could select his own witnesses, ask his own questions, and take down as much or as little of the answers as he pleased. There is no one to show how much has been taken down and how much omitted. There was no cross-examination to sift the conscience of the witnesses.

Further than that, many of the facts contained in these depositions are not referred to in any of the specifications in the contestant's notice. The sitting delegate never had an opportunity to see these depositions or know what they contained until he saw them in print in the miscellaneous documents in this case, published by order of the House. His own depositions were taken in ignorance of what was contained in the testimony of the contestant, and he has consequently not examined some of the witnesses in reference to some things, which he might and probably would otherwise have done, in order to protect his own reputation against some statements made by contestant's witnesses.

On June 13, 1864, the House adopted the first resolution—yeas 91, nays 1. The second resolution was then agreed to—yeas 64, nays 31.

NOTE.—The debate will be found in volume 52, pages 2852-2861. For report: Mr. Dawes, page 2861; Mr. Farnsworth, page 2882. Against report: Mr. Scofield, pages 2864, 2882; Mr. Upson, page 2886.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

LINDSAY *vs.* SCOTT, *of Missouri.*

The contestant's principal allegation in this case was that disloyal men voted for the sitting member in contravention of the law of the State. The committee, upon examination of the specific charges, held that the sitting member received a majority of the legal votes cast. The House agreed to the report.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 20, 1864.

Mr. UPSON, from the Committee of Elections, made the following report:

The election in contest was held on the third day of August, A. D. 1863, under and in pursuance of a proclamation of the governor of Missouri, calling a special election in the third district of Missouri, to fill the vacancy caused by the decease of the Hon. John W. Noell, the representative elect from said district to the 38th Congress.

At said election the said contestant, James Lindsay, the sitting member, John G. Scott, and one Joseph Bogy were candidates to fill said vacancy, and on the return and canvass of the votes the certificate of election was given to John G. Scott, the sitting member.

The following certified abstract, taken from page 9 of the printed evidence in the case, (Mis. Doc. No. 43,) shows the several counties composing said district, and the number of votes polled in each county at said election, and returned to the secretary of state, and included in the final canvass:

An abstract of votes polled in the several counties comprising the third congressional district of the State of Missouri, at a special election begun and held in said district on Monday, the 3d day of August, A. D. 1863, for the election of a member of the House of Representatives of the 38th Congress of the United States from said third district, to fill the vacancy caused by the death of the honorable John W. Noell, late a member from said district.

Counties.	John G. Scott.	James Lindsay.	Joseph Bogy.	Thomas Scott.
Reynolds	32 votes	64 votes	.....	.....
Washington	500 "	262 "	119 votes	.....
Mississippi	212 "	.....	.....	.....
Perry	561 "	358 "	154 "	.....
Scott	89 "	164 "	.....	5 votes.
St. Genevieve	385 "	224 "	103 "	.....
New Madrid	38 "	.....	.....	.....
St. Francois	593 "	215 "	27 "	.....
Wayne	161 "	217 "	7 "	.....
Iron	197 "	519 "	6 "	.....
Madison	315 "	148 "	8 "	.....
Dent	3 "	42 "	.....	.....
Bollinger	6 "	99 "	18 "	.....
Cape Girardeau	466 "	686 "	2 "	.....
Stoddard	1 "	72 "	.....	.....

UNITED STATES OF AMERICA, *State of Missouri, ss:*

I, Mordecai Oliver, secretary of state of the State of Missouri, hereby certify that the above and foregoing is a full, true, and correct statement of the votes cast at the special election held in the several counties composing the third congressional district in this State, for the several candidates for a seat in the 38th Congress of the United States, to fill the

vacancy caused by the death of the late honorable John W. Noell, on the 3d day of August, A. D. 1863, as fully as the same appears from the abstracts of said votes now on file in this office.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed the seal of office. Done at office, in the city of Jefferson, this 27th day of November, A. D. 1863.

M. OLIVER, *Secretary of State.*

The aggregate vote returned according to this abstract is 7,075, of which Scott received 3,559, and Lindsay 3,070, giving Scott a plurality of 489 votes.

The grounds of contest specified by the contestant will be found set forth at length in his notice on pages 1, 2, 3 and 4 of the printed case, miscellaneous document No. 43. Among other things, the contestant insists, in substance, that, at various townships and election precincts in the several counties in the district, the voters were not required to take, and did not take, the oath prescribed by the convention ordinance of the State; and that, in numerous instances, neither the judges nor clerks of the election were sworn, as required by said ordinance, before entering upon their duties as such judges or clerks, and therefore that the votes cast in such townships and at such election precincts were illegal, and should be rejected.

With the history of Missouri since the breaking out of the rebellion, and the proceedings of her State convention, called in consequence of the civil troubles and dissensions incident to the same, this house is already familiar; but for the purpose of illustrating the legal point raised by the contestant, it is proper to lay before the House that part of the convention ordinance which is relied upon by the contestant in support of his position.

The sections referred to are as follows:

AN ORDINANCE defining the qualifications of voters and civil officers in this State.

Be it ordained by the people of the State of Missouri in convention assembled, as follows:

SECTION 1. No person shall vote at any election to be hereafter held in this State, under or in pursuance of the constitution and laws thereof, whether State, county, township, or municipal, who shall not, in addition to possessing the qualifications already prescribed for electors, previously take an oath in form as follows, namely:

"I, ——— ———, do solemnly swear (or affirm, as the case may be) that I will support, protect, and defend the Constitution of the United States, and the constitution of the State of Missouri, against all enemies and opposers, whether domestic or foreign; that I will bear true faith, loyalty, and allegiance to the United States, and will not, directly or indirectly, give aid and comfort or countenance to the enemies or opposers thereof, or of the provisional government of the State of Missouri, any ordinance, law or resolution of any State convention or legislature, or any order or organization, secret or otherwise, to the contrary notwithstanding; and that I do this with a full and honest determination, pledge, and purpose faithfully to keep and perform the same, without any mental reservation or evasion whatever. And I do further solemnly swear (or affirm) that I have not, since the 17th day of December, A. D. 1861, wilfully taken up arms or levied war against the United States, or against the provisional government of the State of Missouri. So help me God."

* * * * * * * *

SEC. 5. That judges and clerks of all elections held under the laws of this State shall, in addition to taking the oath required by existing laws, take the further oath that they will not record, nor permit to be recorded, the name of any voter who has not first taken the oath required to be taken by the first section of this ordinance.

SEC. 6. The general assembly of this State may at any time repeal this ordinance, or any part thereof.

Adopted June 10, A. D. 1862.

The "qualifications prescribed for electors," referred to in the first section of said ordinance, and to which the qualifications prescribed in the ordinance were in addition, are as follows:

The constitution of the State of Missouri, in Article III, section 10, fixes the qualifications of voters as follows:

"SECTION 10. Every free white male citizen of the United States who may have attained to the age of twenty-one years, and who shall have resided in this State one year before an election, the last three months whereof shall have been in the county or district in which he offers to vote, shall be deemed a qualified elector of all elective officers."

It is apparent that the qualifications prescribed by the ordinance of the convention were intended to prevent, as far as possible, disloyal men from exercising the elective franchise, and to declare them disqualified to vote, and also to enjoin and enforce greater care and obligation upon judges and clerks of election (who might otherwise, in some cases, be disposed to wink at or silently permit a violation of the provisions of the ordinance in this respect) to see that the ordinance was strictly complied with. While it may be urged, with much plausibility and force, that if a person otherwise qualified to vote, though in fact notoriously disloyal, should voluntarily take the convention oath, and thereupon offer his vote, the judges, by the strict letter of the law, could not arbitrarily reject or refuse to receive his vote, yet it is apparent that the true spirit and intent of the ordinance is to disfranchise and prohibit all rebels and rebel sympathizers from voting, and to make their votes, if cast, wholly illegal. No one who did not take the oath truthfully could be legally entitled to the benefits of the ordinance in this respect. Taking the oath formally but fraudulently and not truthfully, would not legalize the vote, nor make the affiant a loyal elector.

A neglect or refusal to take the oath disqualified the voter by the express language of the ordinance; and hence, wherever it appears that the election was conducted by the judges without having the oath administered to the voters, or wherever the voters were permitted to vote without having first taken the oath, the committee have felt bound, by the express provisions of the ordinance, to reject all such votes as illegal and void, no matter for whom they were cast. The townships or election precincts where voting of this kind appears from the evidence to have been permitted we will now proceed to notice.

In Iron county, in the township of Kaolin, the oath prescribed by the convention ordinance was neither taken by the voters nor by the judges of election, as is shown by the testimony of William Quisenberry, one of the judges of election, page 12. The vote of this township, as returned and canvassed, is shown in the testimony of David Humphrey, on page 24, to have been, for Lindsay 2, for Scott 59.

In Wayne county, at Cedar Creek precinct, the convention oath was neither administered to the voters nor to the clerks of election.—(See testimony of P. B. Short, page 28, who was one of the judges of election.) He says, on page 29, on cross-examination, that he tried to have the voters take the convention oath, but that the other judges thought it was of no use. He states the vote to have been 17 for Lindsay, and 36 for Scott, which is objected to by the incumbent as not the best evidence.

In Madison county, Castor township, neither the voters, judges of election, nor clerks took the convention oath.—(See testimony of George Davis, one of the judges, page 100.) The number of votes polled here is shown on page 109, and also copy of poll-book is given on page 111—16 votes for Lindsay, 20 for Scott.

In Concord township, Washington county, the convention oath was not administered to the voters, judges, or clerks, but an oath fixed up, dictated by one A. R. Eaton.—(See testimony of A. G. Bush, page 50, and of A. R. Eaton, pages 162 and 163, showing a form of oath different from the one prescribed in the convention ordinance, and how it was gotten up, and by whom.) The vote is given in testimony of Moses Brooks, on page 58—1 for Lindsay, 133 for Scott.

In Liberty township, in same county, the ordinance oath was not administered to voters, judges, or clerks; but a kind of oath differing from that was prepared there, and administered.—(See testimony of J. B. Johnson, page 53.) The vote is given in testimony of Moses Brooks, on page 58—7 for Lindsay, 63 for Scott.

In Madison county, Polk township, it is shown by the testimony of Wilson Bonn, pages 105 and 106, that seven persons voted without taking the oath. It is not shown for whom they voted, except in one instance one of them voted for Scott. This should be rejected. The other six were illegal, but it is impossible to distinguish them from the other votes cast here.

By an act of the general assembly of the State of Missouri, approved March 23, 1863, (Laws of Missouri, 1863, page 17,) certain amendments were made to the laws of that State in regard to elections, and among other things ordering the elections to be by ballot, and to continue for one day only. It also provided that the judges of election should "cause to be placed on each ballot the number corresponding with the number of the voter offering the same," and that "*no ballot not numbered shall be counted.*" The contestant, in his notice, alleges that, in several of the townships and election precincts, this provision of the law was wholly disregarded, and therefore that the votes so cast should be rejected.

The provisions of the statute in this respect are clear and explicit, and, in the opinion of the committee, expressly prohibit the counting of any such votes by the judges of election.

The following townships and precincts appear to be open to this objection:

In Benton township, Wayne county, the ballots were not numbered, but were torn up, most of them, and the rest left on the bench where they were voted.—(See testimony of Josephus Moore, pages 30 and 31.) According to his testimony (which is objected to by contestant as not the best evidence of the fact) the vote was for Lindsay, none; for Scott, 35.

In German township, Madison county, the ballots were not numbered.—(See testimony of B. J. Allbright, pages 106 and 107, which also gives the number of votes cast. See also copy of poll-book, on pages 115 and 116—for Lindsay, 1; Scott, 68.)

In Punjaub township, St. Genevieve county, also, the ballots were not numbered.—(See testimony of Charles C. Rozier, pages 116 and 117, giving also the vote; and see also, for the number of votes, page 122—Lindsay, 19; Scott, 40.)

In Cape Girardeau county the votes of company B and company C, of the 29th regiment of Missouri volunteers, was regularly returned to the office of the county clerk of said county within the twenty days allowed by law, the election being held on the 3d of August, 1863, and said returns having been made on the 22d day of said August. The clerk certifies (see page 44) that he did not include them in the abstract of votes he certified to the secretary of state, because the vote appeared to have been taken *viva voce*, and he was uncertain as to the law in that respect; but he adds that if that mode of voting was according to law, that then these votes should be counted. It will be seen by section 10 of "An ordinance to enable citizens of this State in the military service of the United States, or of the State of Missouri, to vote," adopted June 12, 1863, by the Missouri State convention, that it provided that "the votes given at such company elections shall be given *viva voce*, or by tickets handed to the judges," &c.; and by section 9 of the same ordinance, twenty days after the election are allowed the clerk of the court within which to examine and cast up the votes, and these votes were returned to him before the expiration of that time. The only objection raised to these votes by the sitting member is that they were, as he alleges, returned one day too late, and that the vote was given *viva voce*. We have seen that the vote is not legally liable to either of these objections, the return having been made in time, and the vote being taken according to law. The vote was 37 for Lindsay and 1 for Scott, and the committee consider that these votes should properly and legally be added to the aggregate vote of the respective parties for whom they were cast.

In addition to the foregoing townships, the contestant also claims, from the evidence on pages 10, 11, and 12, that the vote of Iron township, in Iron county, was illegal because the ballots were destroyed; but as it is shown that they were regularly numbered and counted, and the vote indorsed on the poll-books before the destruction of the ballots, there seems to be no good ground for rejecting the votes here cast.

The contestant claims that the vote of Belleview (or Caledonia) township was illegal, for the reason that the ordinance oath was not administered to the judges or clerks of the election; but as the vote of the township is not given in the testimony, it was not thought necessary to consider the objection.

The vote of Old Mines (or Union) township is claimed to have been certified without authority. The evidence on this point is very defective, and the sitting member also objects that the vote of this town is not covered by contestant's notice. The evidence is insufficient to reject the vote under the circumstances.—(See pages 55 to 58, and 67 to 69.)

The vote of Dent station or precinct, in St. François county, is also claimed to be illegal, on the ground that the clerks did not take the oath prescribed by the 5th section of the ordinance. All the evidence is the testimony of William Dent, on pages 69 and 70, and it is too uncertain and indefinite to sustain the objection, even if it were a sufficient ground for rejecting the vote.

Contestant also claims that in St. Genevieve county, at the court-house precinct, two of the judges of election were disloyal men; but the evidence he adduces to support it is insufficient to justify the committee in taking any action upon it, and the incumbent also objects that there is nothing in the specifications in contestant's notice to which it can apply.

Contestant also alleges and insists that in St. François county eighty disloyal persons voted for the sitting member, and also that in Perry county and Mississippi county disloyal persons voted for the sitting member. The majority of the committee, considering the evidence furnished by contestant on this point defective and insufficient, do not feel authorized by the proofs to reject the votes so objected to in these counties, and therefore allow the returns of votes to stand as made. The sitting member has raised numerous objections to the sufficiency of the allegations in contestant's notice, both as to matters of form and substance, and to the admission of testimony under the specifications, some of which are obviously informal and frivolous, but the committee have not deemed it important to examine or decide the points thus made, or to consider the objections raised by the sitting member to some of the votes cast for contestant, as the conclusion to which the committee have come on the case made by the contestant renders it unnecessary. After rejecting all votes illegally cast for either party, so far as contestant's evidence satisfactorily shows, the committee still find a small majority of votes in favor of the sitting member. The following statement will show the votes rejected, but some of the committee are not prepared to reject votes where the ballots were not numbered:

	Lindsay.	Scott.
Kaolin	2	59
Cedar Creek	17	36
Benton	0	35
Castor	16	20
German	1	68
Concord	1	133
Liberty	7	63
Punjaub	19	40
Polk	0	1
	63	455

Vote for Lindsay	3,070
Deduct	63
	3,007
Vote of companies B and F for Lindsay	37
Total for Lindsay	3,044
Vote for Scott	3,559
Deduct	455
	3,104
Vote of companies B and F for Scott	1
Total for Scott	3,105
Total for Lindsay	3,044
Majority for Scott	61

The committee therefore recommend the adoption of the following resolution:

Resolved, That John G. Scott is entitled to retain his seat in this house as a representative from the third congressional district of Missouri.

The House agreed to this report, without debate or division, June 24, 1864.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

KLINE *vs.* MYERS, *of Pennsylvania.*

The contestant, failing to substantiate his charges, asked for a recount of the ballots. The committee held that such an application must be founded upon proof sufficient to raise a presumption of fraud or irregularity, and should not be granted upon the suggestion of error. The House adopted the report.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 22, 1864.

Mr. SCOFIELD, from the Committee of Elections, made the following report:

The contestant, by his own acknowledgment, has failed to substantiate the specifications or charges contained in his notice of contest by any evidence he has been able to lay before the committee, and it is therefore unnecessary to make any statement of the facts in the case. He, however, furnishes satisfactory evidence that he had made an unsuccessful effort to procure a recount of the ballots within the sixty days allowed for the taking of depositions, and before the officers selected for that purpose. And upon his showing this fact, and upon his further suggestion that the result of a recount might possibly differ, from the first, he bases an application for an order from this house to send for the boxes and recount the votes.

The committee were of opinion that such an application should be founded upon some proof, sufficient, at least, to raise a presumption of mistake, irregularity, or fraud in the original count, and ought not to be granted upon the mere suggestion of possible error. The contestant failed to furnish such proof. On

the contrary, so far as appeared by the evidence presented to the committee, the election was conducted with perfect good order and fairness throughout the day, and at the close the votes were carefully and accurately counted, the officers participating therein being nearly equally divided in their political alliances. The list of voters, tally papers and returns, were properly made out and disposed of according to law. There is nowhere in the evidence a reasonable suspicion of wrong. To adopt a rule that the ballot-boxes should be opened upon the *mere request* of the defeated candidate would occasion more fraud than it could possibly expose. The number of ballot-boxes in each congressional district is seldom less than fifty, and often more than two hundred. They are usually left in the care of a magistrate or some township officer, by whom they are deposited in no safer place than an upper shelf in a public office. The opportunities of tampering with the boxes thus scattered through the district would be abundant; and if it was known in advance that a second count could be had without discrediting the first, the temptation to do so would be strong. It makes no difference in settling the rule ,that in this particular case the votes had been carefully guarded by the mayor and recorder, under a special law for the city of Philadelphia. That fact would only strengthen the confidence in the result of a recount in this case, but does not show the propriety of establishing a general rule authorizing a recount whenever asked. It should be remembered that the fact sought is not what the ballot-boxes contain six months or a year after the election, but what they *did* contain after the last vote was deposited on the day of election. Certainly an impartial, accurate and public count, then, by the sworn officers of the law, would be better evidence of that fact than any subsequent count not more impartial and not presumed to be more accurate than the first, and after boxes had been long exposed to the tampering of dishonest partisans. The adoption of such a practice would be equivalent to setting aside the first count altogether, and it ought on that principle to be dispensed with, and the ballots sent to this house instead of certificates.

The rule adopted by the committee is in accordance with the universal practice of courts of justice, where a new trial or a rehearing is never granted except upon proof of probable error in the first, in accordance with the rulings in several contested election cases decided in the courts of the State from which this contest comes, and believed not to be in conflict with any precedent of this house.

The committee, therefore, recommend the adoption of the following resolutions:

Resolved, That John Kline is not entitled to a seat in this house as a representative in the 38th Congress from the third congressional district of Pennsylvania.

Resolved, That Leonard Myers is entitled to the seat now occupied by him as a representative in the 38th Congress from the third congressional district of Pennsylvania.

When the report in this case was submitted, Mr. DAWES remarked as follows:

Mr. DAWES. I do not concur with the majority of the committee in the ruling by which the contestant in this case was denied process to summon witnesses to prove certain allegations in his notice of contest. I am of opinion that when a party has conformed his allegations to the statute he is entitled, as of right, to the production of any legal testimony that will tend to prove such allegations; and that neither the law nor usage of the House requires of him to first show probable cause to believe that his allegation is true before he can have such process as will produce the evidence to prove it so. Whether I should utimately concur with the committee in the final conclusion to which they have arrived would depend, of course, upon the character of such testimony when produced.

Mr. GANSON. I desire to say that I concur fully with the chairman of the Committee of Elections in the views he has just expressed, and I hope the House will sustain him when they are called upon to act in this case.

The House adopted the resolutions reported by the committee without division, June 24, 1864.

NOTE.—The debate in this case will be found in vol. 53, pages 3179, 3242.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

CARRIGAN *vs.* THAYER.

The contestant asked for authority to summon witnesses and the ballot-boxes for examination by the committee, the ground being that these witnesses failed to obey a subpœna *duces tecum* issued by two justices of the peace.

The committee held that as the law was clear that these justices of the peace had no jurisdiction, there being resident in the district three judges of the court of common pleas, the contestant was not entitled to the relief asked for, he having taken no legal steps to procure the testimony. The House sustained the report.

IN THE HOUSE OF REPRESENTATIVES,

JUNE 22, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

The notice, answer, and accompanying evidence are contained in Mis. Doc. No. 17. At the hearing, the contestant made application to the committee for authority from the House to summon the mayor and recorder of Philadelphia, the legal custodians of the ballot-boxes of a portion of this district, to bring with them for examination the ballot-boxes of the several precincts of the district, situate in the city of Philadelphia, either before the committee itself or some magistrate authorized to take the testimony. The ground of this application was stated to be the failure of those witnesses to obey a subpœna *duces tecum*, issued by two justices of the peace, during the time limited by the statute of 1851 for taking testimony in this case, and requiring them to appear before said magistrates at an appointed time, bringing with them for examination said ballot-boxes.

By the statute of 1851, sec. 3, (Brightly's Dig., p. 254,) the officers authorized to issue subpœnas and examine witnesses are named. They are "any judge of any court of the United States, or any chancellor, judge or justice of a court of record of any State, or any mayor, recorder or intendant of any town or city, which said officer shall reside within the congressional district in which said contested election was held." By the ninth section of the same act it is provided that "when no such magistrate as is by the third section of this act authorized to take depositions shall reside in the congressional district from which the election is proposed to be contested, it shall be lawful for either party to make application to any two justices of the peace residing within the said district, who are hereby authorized to receive such application and jointly to proceed upon it in the manner hereinbefore directed."

It will be seen that two justices of the peace have jurisdiction and authority only when there are none of the magistrates mentioned in the third section resident in the district. When any one of those magistrates resides in the district the two justices can do nothing. Now it appeared that there were resident in this district, during the whole time fixed by the statute for taking testimony in this case, three judges of the court of common pleas of the State of Pennsylvania, a court of record. The two justices of the peace had therefore no jurisdiction or authority in the premises, and their subpœna was therefore only so much blank paper, which no one was bound to obey.

It follows that the contestant had taken no legal steps to procure this testimony within the time fixed by law. The contestant showed no good reason for this omission, and while some of the committee were of opinion, for the reasons stated in the report in the case of Kline *vs.* Myers, that the contestant was not entitled to this testimony without first showing some ground of suspicion that

the return was not correct, all of the committee were of opinion that, for the reason heretofore stated, the contestant having taken no legal steps to procure this testimony, and showing no good reason for the omission, he is not entitled to the relief prayed for. The application was therefore denied. The contestant thereupon, stating that without this testimony he had no evidence sufficient to entitle him to a report in his favor, submitted to an adverse report. The committee accordingly recommend the adoption of the following resolutions:

Resolved, That Charles W. Carrigan is not entitled to a seat in this house as a representative in the 38th Congress from the fifth congressional district in Pennsylvania.

Resolved, That M. Russell Thayer is entitled to a seat in this house as a representative in the 38th Congress from the fifth congressional district in Pennsylvania.

The House adopted the report without debate or division, June 24, 1864.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

SEGAR, *of Virginia.*

A small part only of the voters of the district participated in the election, and the claim to a seat was denied.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 25, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

That under the new apportionment, the State of Virginia was entitled, previous to the separation of West Virginia, to eleven representatives; and the legislature of the State assembled at Wheeling, at the session commencing December, 1862, which was also previous to the separation, passed an act approved January 30, 1863, (Session Laws, 1862–'3, page 32,) districting the State in conformity to the United States statute, (Statutes at Large, 572.) The first district, in which Mr. Segar claims to have been elected, is composed of the following counties, viz: Accomac, Northampton, Northumberland, Westmoreland, Richmond, Essex, Lancaster, Middlesex, King and Queen, King William, New Kent, Gloucester, Matthews, York, James City, Elizabeth City, Warwick, Charles City, King George, and Caroline.

The election was held on the fourth Thursday of May, 1863, and a certificate of election, in substantial conformity with the laws of Virginia as amended by the act of January 31, 1862, (Session Laws, 1861, chapter 44, page 40,) was furnished Mr. Segar by the officer required by that statute to certify an election of representative in Congress. This certificate accompanies this report. Mr. Segar claimed that having presented a certificate in conformity to the laws of Virginia, he is now entitled to be sworn in, and to occupy the seat as a representative till some one else appears showing a better title to it. But the committee were of opinion that they should inquire into and report the facts concerning this election and their conclusion thereon.

The following statements, made by Mr. Segar himself to the committee with great candor and frankness, are believed to be substantially correct. The polls were opened on the day of election fixed by law, at all the precincts in Accomac, Northampton, and Elizabeth City, and at one precinct in York, at which it is believed that a few, perhaps ten or twelve votes, were cast by residents of Warwick coming over from that county in accordance with a special provision of the laws of Virginia. The exact number of votes cast at these several pre-

cincts where polls were actually opened, the committee could not ascertain with exact precision. They were, however, nearly as follows—certainly not exceeding this number:

In Accomac	1,120
Northampton	305
Elizabeth City and York	242
Total number of votes	1,667

Of these, Mr. Segar received about thirteen hundred votes.

There was no election held elsewhere in the district than in the counties above mentioned. All, or nearly all, the remainder of the district was in the armed occupation of the rebels. If any portion of it except the above-named counties was outside of the confederate lines, it was so near the enemy as to practically render the unrestrained exercise of the elective franchise by Union men an impossibility. And therefore the case may be treated as one where, in a district containing twenty counties, polls were opened in four of them, and sixteen of them were under rebel control. The committee sought to ascertain the relative proportion of voters in these four counties. The population of the whole district in 1860 was as follows:

Population of the first district, 1860.

Counties.	White males.	Total whites.	Blacks.	Aggregate.
Accomac	5,314	10,661	7,925	18,586
Northampton	1,493	2,998	4,834	7,832
Elizabeth City	1,755	3,180	2,618	5,798
York	1,210	2,342	2,607	4,949
Total in the counties voting	9,772	19,181	17,984	37,165
Northumberland	1,873	3,870	3,661	7,531
Westmoreland	1,721	3,387	4,895	8,282
Richmond	1,832	3,570	3,286	6,856
Essex	1,626	3,296	7,173	10,469
Lancaster	1,009	1,981	3,170	5,151
Middlesex	969	1,863	2,501	4,364
King and Queen	1,842	3,801	6,527	10,328
King William	1,284	2,589	5,941	8,530
New Kent	1,093	2,146	3,738	5,884
Gloucester	2,301	4,517	6,439	10,956
Matthews	1,831	3,865	3,226	7,091
James City	1,088	2,167	3,631	5,798
Warwick	340	662	1,078	1,740
Charles City	931	1,806	3,803	5,609
King George	1,161	2,510	4,061	6,571
Caroline	3,340	6,948	11,561	18,509
Total in counties not voting	24,241	48,978	74,691	123,669
Total in the district	34,013	68,159	92,675	160,834

There was, of course, no such number of inhabitants in this district at the time of this election as the census of 1860 discloses in this table. But it is fair to presume that the diminution of population consequent upon the rebellion has been about the same in all parts of the district, and that the Union men in one portion bear about the same ratio to the whole that they do in any other. This table, then, affords the data from which to determine how general has been

the expression at the polls in this election. From this it appears that a little more than one-fourth (9,772 out of 34,013) of the white male inhabitants of the district, and a little less than one-fourth of the entire population (37,165 out of 160,834,) and that after deducting from this number two-fifths of the slaves, did not participate at all in this election. Taking the ratio of loyal voters in the counties that did not vote to be the same as in those that did, it would appear that while about 1,700 (of which Mr. Segar received about 1,300) votes were cast, there were in the district of loyal men who did not vote about 5,100.

It is true that the legality of an election does not necessarily depend upon the relative number of loyal voters who attend the polls and of those who stay away. If all are at liberty to vote, those who stay away must always be considered as acquiescing in the action of those who do not. But acquiescence implies liberty to protest. If one stays away because he could not go, it is absurd to say that he stays away because he acquiesces. When a man is forcibly silent because his mouth is stopped, nothing can be taken against him for not speaking. If, then, 5,000 Union men have been kept from the polls by the arms of the rebels, it cannot be said that they acquiesce in the choice made by 1,700 who were at liberty to go. It cannot be known, therefore, by the proceedings on election day, that Mr. Segar was the choice of the legal voters of the district. He might have been and he might not have been. The committee have no evidence that, had all been permitted to vote, he would not have been such choice, nor have they that he would. Upon this point it is impossible to know, for less than one-fourth of the voters were permitted to speak.

The question is, upon this state of facts presented, whether, upon any known principle or precedent, Mr. Segar can be admitted to this seat as the legally chosen representative of this district. All principle seems against it. By no process of reasoning can the committee infer from what was done that Mr. Segar is the choice of the district; and it is upon no other base that a right to a seat here can at any time rest. And precedent is equally against it. In the reported cases during the last Congress the Committee of Elections and the House had occasion frequently to pass upon this very question. And the principles there laid down by the committee, and sustained in every instance by the House, both when reporting in favor of a right to the seat, as in the cases of Clements, from Tennessee, and Flanders and Hahn, from Louisiana, and when reporting adversely, as in the cases of Upton, Segar, and McKenzie, from Virginia, and Hawkins, from Tennessee, govern this case. Each of these cases was determined upon the facts peculiar to the case. But in them all it was recognized as a rule that where the vote actually polled was such a minority of the whole vote that it could not be determined that the person selected by that minority was the choice of the whole district, and the absent majority were not voluntarily staying away from the polls, but were kept away by force, then no such selection thus made could be treated as an election.

The committee deem this a wise rule, and adhere to it in the present case. They therefore recommend the adoption of the following resolution:

Resolved, That Joseph Segar is not entitled to a seat in this house as a representative in the thirty-eighth Congress from the first district in Virginia.

The report was agreed to, (May 17, 1864)—yeas 94, nays 23.

NOTE.—The debate, which was brief, occurs in vol. 52, page 2311.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

FIELD, *of Louisiana.*

The State not having been divided into congressional districts under the existing apportionment, and the election not being a free one, owing to military interference, it was held to be invalid.

IN THE HOUSE OF REPRESENTATIVES,

JANUARY 25, 1864.

Mr. DAWES, from the Committee of Elections, made the following report:

That they have had the same under consideration, and have heard the claimant and others in support of his claim, and find the fol'owing facts: Mr. Field claims to have been elected on the 2d day of November, 1863, the day provided by law in Louisiana for the election of representatives to Congress, and from what is termed by him "the first congressional district" in that State, by which is meant the first congressional district of that State under the apportionment preceding the last. Under that apportionment Louisiana was entitled to four representatives, and the State was divided into four districts. Under the present apportionment the State is entitled to five representatives, and by a statute passed by Congress July 14, 1862, (12 Statutes, 572,) these five members were required by law to be elected from "districts composed of contiguous territory equal in number to the number of representatives to which said State may be entitled in the Congress for which said election is held." It was therefore necessary, before an election could be held in compliance with this law, that the State should be divided into five instead of four districts. By a reference to the credentials of Mr. Field, which are made a part of this report, it will be perceived that the credentials of three men are embodied in one, and they certify not only that Mr. Field is elected from the first district and Mr. Cottman from the second district, but also that Joshua Baker is elected from the fifth congressional district, composed of the whole State of Louisiana, and that this election was in accordance with the constitution and laws of said State of Louisiana. No law of Louisiana exists authorizing such a proceeding, and it is in direct conflict with the law of the United States already referred to. The State has never been divided into districts under the present apportionment according to the requirements of that act. If, therefore, there was no other difficulty in the way of giving effect to this alleged election, it could not be said that it had been held in conformity with, but in contravention of, law.

But if search be made in this case for a constituency behind all forms, there will be found as entire a lack of this essential as of conformity to legal requirement. The election purports to have been held in the first congressional district of Louisiana under the old apportionment. That district is composed of the two parishes of Plaquemines and St. Bernard, containing, in 1860, only twelve thousand five hundred and sixty-six inhabitants, of whom only two thousand five hundred and sixty-three were male whites, and a large portion of the city of New Orleans, containing, in 1862, when this district was formed, about the balance of the then apportionment of ninety-three thousand, and in 1860 of course a much larger number.

But no election was held on the second day of November in any part of this district but the two parishes of Plaquemines and St. Bernard.

The precise number of votes actually cast for Mr. Field in these two parishes the committee have not been able to ascertain. Mr. Field had before the committee returns from two or three precincts in St. Bernard, which were made to

a committee appointed to aid in conducting the election, and amounting to one hundred and fifty-six votes, and he believed, though he had no personal knowledge of the fact, that about as many more votes were cast for him in Plaquemines. But in all that part of the district made up of the city of New Orleans, comprising almost the entire district, certainly more than nineteen-twentieths of the inhabitants, there was no election held, and no opportunity given for an elector to express his choice. The election, so far as the city of New Orleans was concerned, was suppressed by orders emanating directly from the military governor of the State, Brigadier General Shepley. This suppression was effectual, so that not a vote was cast in the city, and the only constituency Mr. Field has was the small number of votes already stated from the very small fraction of the district situated outside the city limits. Without stopping now to comment upon this order of General Shepley suppressing the election, right or wrong, it was effectual, and in no proper sense can the proceedings be treated as an election. If the election was to be held in that congressional district, which, as has already been shown, was not according to law, still the voters of the district had no opportunity to make a choice. More than nine-tenths of them were silent, not of their own will, but by force of the military arm. Their mouths were stopped, and they cannot, therefore, be treated as having assented to what was done by the few who did have an opportunity to speak outside the city limits. However desirous all may be of restoring representation from districts situated as this is at as early a period as possible, the committee can find no ground upon which these proceedings can be treated as an election, and are unanimous in reporting adversely to the claim of Mr. Field.

It is due to him, however, that the committee should add that the testimony before them disclosed abundant evidence of his loyalty to the government, and of his temperate and judicious efforts to restore the State to the discharge of its functions as a member of the Union. The evidence was equally gratifying that the city of New Orleans had in no degree fallen back from that quiet, orderly, and loyal condition in which, under the auspices and with the co-operation of this same military governor, the city one year ago elected two representatives to the last Congress, by a very large vote, who served out here what remained of that Congress, on an equal footing with all others. The committee know of no other reason why another election could not have been held on the second day of November, the day provided by law for regular elections, except the failure of Congress to district the State, in conformity with the law already quoted. And had the claimant been able to have removed that difficulty, the interference of the military governor in suppressing an election on the day provided by law for holding it would have been without justification, and would, in the opinion of the committee, have deserved the condemnation of the House. It is to be regretted that any opposition which the military governor felt called upon to make to the peaceful exercise of the elective franchise by legal voters, on the day fixed by law for the election of representatives in Congress—the highest and most sacred privilege guaranteed to the citizen—should not have been based upon the legal and defensible ground above alluded to. It did not appear before the committee whether the military governor acted in this matter in obedience to orders from his superiors or not; but sufficient was disclosed to show that the loyal men of that State are much divided, and their strength wasted in pursuing and combatting abstract theories, and in nursing factions, constantly aiming for the ascendency. And there was too much evidence that government officials have been lending the influence of their official position to the advancement of these schemes. It is time there was an end of such proceedings, and those responsible for this state of things should direct to the restoration of order and government, rather than to the triumph of men or factions or theories, the efforts of those placed in temporary authority among that distracted people.

That no undue weight may be given to the credentials of Mr. Field, purporting to come from the government of the State, being signed "J. L. Riddell, governor of the State of Louisiana," it is proper that the facts elicited before the committee, bearing upon the authenticity of this certificate, should be laid before the House.

Mr. Riddell claims to have been elected governor at the same time with the alleged election of Mr. Field. There were but few votes cast for him, five or six hundred, in the parishes about New Orleans, which are joined with that city in the first and second congressional districts under the old apportionment.

The whole election, like that of Mr. Field, was under the auspices of a committee, to whom the votes were returned, and he has himself no personal knowledge of the number of votes cast for himself or for Mr. Field. That he received in all the number of votes already stated is only the best opinion he could form upon the subject. All voting for governor, as well as representative in Congress, in New Orleans, was forbidden by the military governor. The committee express no further opinion here upon the propriety of such conduct on his part, but only state the fact. Mr. Riddell claims to have been elected and qualified as governor by taking the oath of office before a justice of the peace in New Orleans. The term of office to which Mr. Riddell claims to have been elected did not, according to the laws of the State, commence till the first of January, 1864. It is impossible to understand by what process of reasoning this Mr. Riddell has come to the conclusion that he was governor of the State of Louisiana on the twentieth day of November, 1863, the day this certificate bears date.

It was also stated by him that the certificate in question was made out in this city upon information received by him from others, which he believed to be true, but of the truth of which he had no personal knowledge.

For the foregoing reasons the committee are unanimously of the opinion that Mr. Field is not entitled to the seat he claims, and therefore recommend the adoption of the accompanying resolution:

Resolved, That A. P. Field is not entitled to a seat in this house as a representative from the State of Louisiana in the thirty-eighth Congress.

STATE OF LOUISIANA, *Executive Department:*

I, John Leonard Riddell, governor of the State of Louisiana, duly and legally elected by the voters of said State, in pursuance of the provisions of the constitution and laws of said State, do hereby certify that an election begun and held in said State on the second day of November, eighteen hundred and sixty-three, in accordance with the laws of said State, for the purpose of electing five representatives from said State to the thirty-eighth Congress of the United States, the following named persons were regularly elected to represent said State in said Congress for the term of two years from the fourth of March, eighteen hundred and sixty-three, namely: From the first congressional district, A. P. Field; from the second congressional district, Thomas Cottman; from the fifth congressional district, composed of the whole State of Louisiana, Joshua Baker; all of whom were regularly elected in accordance with the constitution and laws of said State of Louisiana.

In testimony whereof, I, John Leonard Riddell, governor elected as aforesaid, and duly sworn, do hereby commission said persons so elected as aforesaid to represent said State of Louisiana in the said thirty-eighth Congress of the United States, and do hereby give these credentials in evidence of their legal and regular election as aforesaid; and I do hereby affix my name and private seal of office, (the public seal thereof being forcibly kept in the possession of the public enemies of the State,) on this twentieth day of November, in the year of our Lord one thousand eight hundred and sixty-three, and the eighty-eighth year of the independence of the United States of America.

[SEAL.]

J. L. RIDDELL,
Governor of the State of Louisiana.

In the debate in the House, Mr. DAWES made the subjoined statement:

I was saying that the committee were unanimous in the conclusion they came to: that they were unanimous in the resolution they agreed to report. But in reference to the report, no member of the committee, except the gentleman who made the report, is responsible for

the statements contained in it. The committee were entirely unanimous upon the resolution; the gentleman from Michigan [Mr. Upson] having one reason therefor, the gentleman from Wisconsin [Mr. Brown] having another, and my distinguished friend from New York [Mr. Ganson] holding perhaps still another reason. But they all agreed that the resolution should be reported, and by no process of reasoning could they come to the conclusion that the gentleman from Louisiana was entitled to a seat upon this floor. This covers the whole merits of the case, and it is quite unnecessary for me, or for any member of the committee, in the full discharge of the duty imposed upon him, to go further than to show that that gentleman is not entitled to a seat here.

The reason why the gentleman is not entitled to a seat seems to be briefly this: he has neither law nor a constituency to sustain him. He has not law to support him for this reason: the Constitution of the United States has provided, in article one, section four, that the Congress of the United States may prescribe the mode of holding an election for representatives in Congress. The Congress of the United States has prescribed the manner of holding this election. That manner has not been conformed to in any respect in the State of Louisiana, and therefore thus far and to that extent the claimant has no law upon his side. Neither did the election conform to the statute of Louisiana, for the reason that the votes were not cast in conformity to law, nor were they counted or canvassed in conformity to law. So, then, the law, so far as that prescribed the manner, the method, and the requirements of an election, is totally against this gentleman. Now, he had no constituency. By that I mean that there was no election, even in that which the claimant calls his district, which can be considered by any sort of rule a proper and just election—a choice by the Union voters of that district, admitting that the old first congressional district was the proper district in which the election should have been held.

In order to show that this gentleman was the choice of the legal voters of that district, you must show that the legal voters of that district had an opportunity to express their choice. I do not mean to say that a man may not be elected to Congress, under some circumstances, with only one hundred and fifty-six votes, the total number polled for this claimant. But when a man in a congressional district of one hundred and twenty-three thousand inhabitants, and ten thousand legal voters, actually receives only one hundred and fifty-six votes, there are almost ten thousand who have not expressed their choice. If they choose to stay away from the polls they are taken to acquiesce in what the one hundred and fifty-six men do at the polls. Under such circumstances it is right and proper to take the vote actually cast as the vote of the district. But when nearly ten thousand of the voters are found to have been prevented from appearing at the polls, and you can bring no charge against them that they voluntarily remained away, they cannot be held to have acquiesced in what one hundred and fifty-six men may have done. Their mouths were stopped, and they were not permitted to protest.

Without stopping for one moment to discuss the propriety or right of military interference here, I have to say that the evidence was abundant that armed men prevented nine thousand eight hundred and forty-four voters in that district from expressing their choice at the polls. By what process of reasoning, then, can it be said that one hundred and fifty-six men who were permitted in one corner of the district, in the parish of St. Bernard, a fraction of the district, to go to the polls and express their choice, expressed the choice of the remainder of the district, and that that remainder acquiesced in what the one hundred and fifty-six men did?

This is the state of the case, and this is all I desire to say.

On February 9, 1864, the report was agreed to—yeas 85, nays 48.

NOTE.—The debate occurs in volume 50, page 543. For report: Mr. Dawes, page 543: Mr. Ganson, page 544; Mr. Brown, page 546.

THIRTY-EIGHTH CONGRESS, SECOND SESSION.

M. F. BONZANO, A. P. FIELD, AND W. D. MANN, *of Louisiana.*

These cases were not acted upon in the House. The committee reported in favor of the claimants.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 11, 1865.

Mr. DAWES, from the Committee of Elections, made the following report:

The election upon which Mr. Bonzano claims the seat was held on the 5th of September, 1864. The number of votes cast was—

For Mr. Bonzano	1,609
For all others	1,456
Total	3,065

This election derives its authority from the constitutional convention which commenced its session in New Orleans, April 6, 1864, which amended essentially and adopted anew the constitution of Louisiana, and, among other things, did, on the 22d of July, 1864, divide the State into five congressional districts, in accordance with the number of representatives assigned to that State in the apportionment under the census of 1860, and ordered an election to be held on the first Monday of September, 1864, to fill the vacancies caused by the failure of the State hitherto to elect representatives to the present Congress. As the election under consideration derives its authority from this convention, a recital of the main facts connected with the origin and action of that convention becomes necessary to a proper understanding of the subject.

From nearly the commencement of the rebellion till the appearance of the federal fleet under Commodore Farragut before the city of New Orleans in April, 1862, the State had been overrun by the rebel armies, and the governor had traitorously abandoned his duty and post, leaving the people without loyal government, and delivered over to the rebellion. Upon the taking possession of New Orleans by General Butler on the 1st of May following, he issued a proclamation, in which, among other things, he invited "all persons well disposed towards the government of the United States" to renew their oath of allegiance, and promised to such the protection of the armies of the United States. Under this proclamation sixty-one thousand three hundred and eighty-two (61,382) citizens took the oath of allegiance before the close of the following October. Subsequently, as the rebel army retired from other portions of the State, and the federal army advanced and extended its lines, the citizens of the districts or parishes thus delivered from the restraint of the rebellion also promptly came forward and renewed their allegiance to the government of the Union. Soldiers, white and black, enlisted into the armies of the Union, and in New Orleans many of the citizens formed themselves into home-guards, to assist the federal authorities in case of an attack by the rebels.

As fast as new parishes were brought into the federal lines, and the people in sufficiently large numbers renewed their allegiance and recognized the authority of the United States, the military governor of the State appointed judges, justices of the peace, clerks of courts, sheriffs, constables, and other civil officers, and performed all the acts which legally and constitutionally devolve upon the governor of Louisiana. In all of which her loyal citizens acquiesced and rendered an unquestioned obedience.

Under a proclamation issued by the then military governor, November 14, 1862, an election was held December 3, 1862, for representatives in the 37th Congress from the first and second congressional districts of the State, under the old apportionment and the law of Louisiana as it existed before the rebellion. In the first 2,643 votes, and in the second 5,117 votes, were cast at this election. And the gentlemen claiming to have been thus duly elected presented their credentials to the last Congress, which, after careful examination and full discussion, admitted them to seats as members. The admission of these representatives to seats, and the opportunity which it gave to the loyal sentiment of the State to be heard and make itself manifest, had a most salutary effect upon the people of that State, and from that time the desire for a new State government and a resumption of State functions rapidly increased throughout all that portion of the State within our lines.

The major general commanding in the department of the Gulf, yielding to the pressure from all sides that he would give direction to some practical end to the efforts which this desire on the part of the people was prompting to reorganize and re-establish their State government, did, under the direction of the President, issue on January 11, 1864, a proclamation which is annexed to this report, inviting the people of Louisiana to participate in an election on the 22d of February of State officers under the constitution and laws of the State, ex-

cept so far as they related to the subject of slavery, which were declared to be to that extent suspended and inoperative. Several orders intended to secure freedom of election and conformity as far as possible to the laws of Louisiana previous to the rebellion were issued by the general commanding, and the evidence is satisfactory to the committee that to the extent of the federal lines this election was general, conducted in good order, free from military or other control, and largely participated in by the people.

It resulted in the election of State officers by a vote of 11,414. At this election no person voted who was not by the constitution and laws of Louisiana a voter, except soldiers and sailors in the service of the United States who were citizens of Louisiana and in the State at the time of the election, to the number of 808. All who voted took the oath prescribed by the President in his proclamation of December 8, 1863.

These officers were installed on the 4th of March following at New Orleans, in presence and with the acclaim of a large concourse of people, estimated at 50,000. On the eleventh of the same month the commanding general issued another order, which accompanies this report, calling for an election of delegates to a convention for the revision and amendment of the constitution of the State. The governor by a proclamation joined in this call. All parties were consulted in reference to this election, and differed only as to the time of holding it.

This convention commenced its sessions at New Orleans, April 6, 1864, and adjourned on the 25th of July. The entire proceedings and debates of this body have been laid upon the tables of the members of this house. The most important changes in the constitution of the State proposed by it were those in relation to slavery. The following were adopted by it, as the first and second articles of the constitution:

TITLE.—*Emancipation.*

ARTICLE 1. Slavery and involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, are hereby forever abolished and prohibited throughout the State.

ARTICLE 2. The legislature shall make no law recognizing the right of property in man.

The proceedings of the convention were, by proclamation of the governor, submitted to the people for ratification or rejection on September 5, 1864, and were ratified without material opposition. The whole number of votes was over 9,000.

This constitutional convention, by an ordinance adopted, divided the State into five congressional districts, and directed elections for representatives to the present Congress to be held in them, on the 5th September, 1864. And in accordance with said ordinance, the governor issued his proclamation directing elections to be held in accordance with it. In pursuance of this ordinance of the convention and proclamation of the governor, elections were held in these several districts for representatives in this Congress; and in the first, M. F. Bonzano received 1,609 votes out of 3,065 cast. The governor gave him, accordingly, a certificate of his election, which has been presented to the House and referred to this committee.

The committee have heard Mr. Bonzano in his own behalf, as also Mr. Field, who claims to have been elected at the same time in the second district, General Banks, and others. The information and arguments submitted by them accompany this report.

This election depends for its validity upon the effect which the House is disposed to give to the efforts to reorganize a State government in Louisiana, which have here been briefly recited. The districting of the State for representatives, and the fixing of the time for holding the election, were the acts of the con-

vention. Indeed, the election of governor and other State officers, as well as the existence of the convention itself, as well as its acts, are all parts of the same movements.

It is objected to their validity, that they neither originated in nor followed any pre-existing law of the State or nation. But the answer to this objection lies in the fact that, in the nature of the case, neither a law of the State nor nation to meet the case was a possibility. The State was attempting to rise out of the ruin caused by an armed *overthrow* of its laws. They had been trampled in the dust; and there existed no body in the State to make an enabling act. Congress cannot pass an enabling act for a State. It is neither one of the powers granted by the several States to the general government, nor necessary to the carrying out of any of those powers; and all "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people.*" It is preposterous to have expected at the hands of the rebel authorities in Louisiana that, previous to the overthrow of the State government, they should prepare a legal form of proceeding for its restoration. In the absence of any such legal form prepared beforehand in the State, and like absence of power on the part of the general government, under the delegated powers of the Constitution, it follows that the power to restore a lost State government in Louisiana existed nowhere, or in "the people," the original source of all political power in this country. The people, in the exercise of that power, cannot be required to conform to any particular mode, for that presupposes a power to prescribe outside of themselves, which it has been seen does not exist. The *result* must be republican; for the people and the States have surrendered to the United States, to that extent, the power over their form of government in this, that "the United States shall guarantee to every State a republican form of government."

It follows, therefore, that if this work of reorganizing and re-establishing a State government was the work of the people, it was the legitimate exercise of an inalienable and inherent right, and, if republican in form, is entitled not only to recognition but to the "guaranty" of the Constitution.

The attention of the committee has, therefore, been directed to the inquiry how far this effort to restore constitutional government in Louisiana has been the work of the people. Those engaged in the traitorous attempt to destroy the government form no part of that people engaged in the patriotic effort to restore it. The government is to be made, if at all, for and by patriots and not by traitors. In answering another and essential question, whether a government once erected in that State will be able to maintain itself against domestic violence, traitors must be counted, but not for their voice in making the government itself. As well might the inmates of a State prison be enumerated and consulted upon determining the character of a code of laws designed for their government.

The evidence before the committee, and all the information they could obtain, satisfied them that the movement which resulted in the election of State officers, the calling of a convention to revise and amend the constitution, the ratification of such revisal and amendment by a popular vote, and the subsequent election of representatives in Congress, was not only participated in by a large majority, almost approaching to unanimity, of the loyal people of the State, but that that loyal people constituted a majority of all the people of the State. Making proper allowance for those who have been driven out by the rebellion, have gone into its ranks, or perished at its hands, and also for the sparsely settled, and in some parts barren character of nearly all that portion of the State still outside of the federal lines compared with the populous and rich and fertile portions within, there can be but little doubt of the correctness of these conclusions. The committee refer to the accompanying statements for the extent, character, and population of the portions of the State within and outside the federal lines.

The committee find from all the facts that this election was held under the auspices of a new State organization which has arisen upon the ruins of the old, in as much conformity to law as the nature of the case would permit—in which the loyal people throughout the State acquiesce—and at this moment in the full discharge of all the functions of a State government. They entertain no doubt of the ability of this government to maintain itself against domestic violence if protected from enemies without. About forty thousand loyal Louisianians, white and black, are now in the armies of the Union, a force amply sufficient to overawe any lurking discontent, or punish any open resistance within its borders. The committee cannot doubt that it is the duty of Congress to encourage this effort to restore law and order in Louisiana. The precedents are many, since the rebellion commenced, of the admission of members where greater irregularities existed than in the present case. In the Louisiana case, in the last House, the committee held the following language, which was sustained by a very large vote in the House:

Representation is one of the very essentials of a republican form of government, and no one doubts that the United States cannot fulfil this obligation without guaranteeing that representation here. It was in fulfilment of this obligation that the army of the Union entered New Orleans, drove out the rebel usurpation, and restored to the discharge of its appropriate functions the civil authority there. Its work is not ended till there is representation here. It cannot secure that representation through the aid of a rebel governor. Hence the necessity for a military governor to discharge such functions, both military and civil, which necessity imposes in the interim between the absolute reign of rebellion and the complete restoration of law. Suppose Governor Moore to be the only traitor in Louisiana: one of two things must take place. The people must remain unrepresented, or some one must *assume* to fix a time to hold these elections. Which alternative approaches nearest to republicanism, nearest to the fulfilment of our obligations to guarantee a republican form of government to that people—closing the door of representation, or recognizing as valid the time fixed by the military governor? Are this people to wait for representation here till their rebel governor returns to his loyalty and appoints a day for an election, or is the government to guarantee that representation as best it may? The committee cannot distinguish between this act of the military governor and the many civil functions he is performing every day, acquiesced in by everybody. To pronounce this illegal, and refuse to recognize it, is to pronounce his whole administration void and a usurpation. But necessity put him there and keeps him there.

In another case, that of Andrew J. Clements, of Tennessee, the committee of the last House, after a careful examination of the whole subject, submitted a resolution, which was unanimously adopted by the House, in favor of his right to the seat he claimed, based upon the following conclusion:

In conclusion, the committee, upon the whole evidence, find that on the day of election no armed force prevented any considerable number of voters in any part of the district from going to the polls, and that on that day, in conformity with the forms of law, two thousand votes at least were cast for the memorialist as a representative to this Congress, and none, so far as the committee know, for any other person. They therefore report the following resolution, and recommend its adoption.

The committee of the present House have had occasion repeatedly to state the same positions in coming to conclusions upon similar cases, in which they have been sustained by the House. They are strengthened in these conclusions upon a re-examination of them in the present case, and they therefore submit the following resolution:

Resolved, That M. F. Bonzano is entitled to a seat in this house as a representative from the first congressional district in Louisiana.

MINORITY REPORT.

The undersigned, minority of the Committee of Elections, to whom was referred a certain paper purporting to be the credentials of M. F. Bonzano as representative from the first congressional district of the State of Louisiana, beg leave to submit the following views, dissenting from the report of the said committee as presented by the majority thereof:

Before proceeding to consider the facts presented by the meagre and unsatisfactory testimony produced before them, the undersigned deem it proper to suggest, briefly, their views of the condition of Louisiana, the true issue proposed for the consideration of this house, and the nature and amount of proof requisite to its proper determination.

The people of Louisiana, acting through their regularly constituted authorities, on the 11th day of December, 1860, ordered a convention and appointed the 23d day of January, 1861, for its assemblage. Pursuant to the act of the legislature an election for delegates was held, and the convention met on the day fixed. On the 25th of the same month an ordinance of secession was adopted by a vote of 113 yeas to 17 nays, which, by authority of the convention, was submitted for ratification and subsequently ratified by a vote of 20,448 to 17,296, and afterward, on the 21st day of March, the same convention ratified the confederate constitution by a vote of 101 to 7.

In these proceedings, not only the regular authorities, but the people of Louisiana participated. In pursuance of the resolution of the people of that State acting through approved and organized bodies, the whole public property of the United States, including great treasure and vast quantities of munitions of war, was seized by public functionaries and transferred to the political organization styling itself "the Confederate States of America."

By official acts and resolutions the authorities of Louisiana, acting by force of the powers with which they were invested by the positive sanction of the people, declared the bonds which had theretofore attached that people to the government of the United States to be disrupted and their allegiance to be transferred to another sovereignty. The government created by them went into existence and full operation, and there was no other government in the State of Louisiana nor any other organized body assuming or pretending to exercise civil functions, executive, legislative, or judicial. Thus was established a government *de facto*.

The operation of this act was very different as affecting the people and government of the United States and the people and government of Louisiana. So far as the United States was concerned, and so far as her rights were to be affected, the act was wholly unconstitutional and void. It changed no relation of citizenship or allegiance, and her rights of jurisdiction and sovereignty remained unimpaired, only suspended in their exercise by the presence of a military power which prevented the operation of civil sovereignty and the enforcement of the laws through the civil magistracy. The necessity for the assertion of these rights by the suppression of armed resistance to her authority required a resort to force, and a manifestation of opposition by organized rebellion developed a condition of civil war, which to the ordinary incidents of sovereignty superadded the rights of a belligerent power. Thus the State of Louisiana became subject to the laws of war, and, rebellion in that State being yet unsuppressed, there has hitherto been no government there recognized by the United States, except the commander-in-chief of the army, and no law except the military code.

Though thus inoperative and ineffectual against the government and people of the Union, the acts of the people of Louisiana were sufficient to work a radical

change in their relations to their former State government. By their revolutionary but voluntary actions they disorganized their own political society, abrogated their former political institutions, and erected in their stead a government operated by a magistracy acknowledging no allegiance to our Constitution, but holding and administering their offices in derogation of and in hostility to the authority and laws of the United States.

By these disorganizing acts the sovereign power of Louisiana reverted to the loyal people of that State, and was held in abeyance until such time as by the suppression of the rebellion and the overthrow of the usurping authority they should be rendered capable to resume the functions of government through the organic action of the people, manifesting their will by their voluntary choice of a government republican in form, and subordinate to the Constitution and laws of the United States.

Whether this has been accomplished is the primary question to be determined; for until there is an organized State, there is no right or capacity to be represented in the Congress of the United States.

In the determination of this question the burden of proof is on those who seek for admission, or claim any benefit under or by force of the establishment of such pretended government. It is matter of public history, recognized and certified by the official acts and declarations of this government, that the inhabitants of the State of Louisiana were in insurrection against the United States, and that such condition still remains wholly unchanged or unaffected by any rescission or modification thereof.

Has evidence been presented which authorizes this house to declare that the people of Louisiana, by any proper mode of expression, have changed the status in which they were placed by their own acts and established a republican government? Such only is the form contemplated by the Constitution; such only has any title to representation on this floor; such only is the United States bound to guarantee or authorized to recognize.

The indispensable quality of such government is that it shall emanate from the people; and not only must it be derived from the great body, but their agency in its organization must have been voluntary. The idea of restraint is incompatible with volition. The government must not only rest on the consent of the governed, but that consent must not be procured by force or intimidation.

It is not sufficient that the result may show that a government apparently republican has been created, but the creation must be the exercise of a will unaffected by the presence of an overawing power.

The erection of a State government is a purely civil act. It has no affinity or connexion with martial law. The civil power is alone capable to distinguish or declare the fact of its establishment or the essential conditions of its existence. The Congress of the United States is the only body having authority, primarily, to recognize the government of a State. Neither the Executive nor any subordinate military commander has capacity to incept or consummate its creation. The undersigned do not insist that an act of Congress is necessary as a prerequisite to enable the people of Louisiana to form a government, but the judgment of Congress must be passed on the result of the action of the people, in the recognition of their act, before representatives can be entitled to admission on this floor. This house must be satisfied that their constitution is ordained in accordance with their deliberate and unforced will, before it can lend its sanction to the act or recognize its validity. Two questions, therefore, are presented for consideration:

1. Did the great body of the loyal people of Louisiana, in fact, participate or clearly concur in the establishment of the government offered for recognition?

2. Was their act the result of their deliberate will and voluntary choice, unprocured by military interference?

If both these questions are affirmatively answered, then the State government set up by the convention of 1861 is entitled to be recognized; if either is negatived, then there can be no pretence of right to such recognition or to the admission of representatives from the State of Louisiana.

In considering these questions it is matter of regret that the testimony before the committee was so limited, being confined to the statements of Major General Banks and A. P. Field, and the evidence of R. V. Montague and Luther V. Parker, all produced by and in support of the right of the claimants.

No one appeared to contest the recognition of the State government, or to dispute the validity of the credentials of the proposed members. The committee had, therefore, no opportunity to examine witnesses adverse to them, although it is well understood that there are many who dissent from the action pretended to have been had in Louisiana, and we are compelled to decide this grave matter upon the *ex parte* declarations of persons interested in, or manifestly strongly affected toward, the recognition of the government inaugurated by the convention. With circumstances so unfavorable to a proper exhibition of the facts attending its organization, the undersigned proceed to consider the two material questions proposed:

1. Did the great body of the loyal people of Louisiana concur in the establishment of the State government demanding our recognition?

There are forty-eight parishes in the State of Louisiana, including the city of New Orleans. Of these, nineteen, to wit, Orleans, Ascension, Assumption, Avoyelles, East Baton Rouge, West Baton Rouge, Concordia, East Feliciana, Jefferson, Lafourche, Madison, Plaquemines, St. Bernard, St. James, St. John the Baptist, St. Mary, Terrebonne, Iberville, and Rapides, sent delegates by a total vote of about 6,500, leaving the residue of the State, or twenty-nine parishes, unrepresented; and at the election for the ratification of the constitution, held on the 5th of September, 1864, being also the day on which representatives to Congress were voted for, the number polled, as returned to the committee, was about 8,000, of which some 6,500 were cast in the city of New Orleans alone, the votes in the fourth and fifth congressional districts amounting, in the aggregate, to 676.

This convention was composed of ninety-five delegates, of which number the parish of Orleans was represented by sixty-three, leaving to the country parishes the residue of thirty-two. The undersigned have no definite information of the number of votes polled in each parish, either at the election of delegates or on the question of ratification, nor the number cast for the constitution, nor, if any, against it, but they are enabled to furnish some indication of the vote outside of New Orleans by the sparse returns which they gather from the journal of the convention.

It appears that the parish of Ascension, within our lines and neighboring to New Orleans, and which in 1860 had a white population of 3,940, elected her delegates by 61 votes; that Plaquemines, with a white population in 1860 of 2,529, cast 246; and in the parish of Madison, the witness Montague was elected by a vote of 28.

It is admitted that the elections were held only in the parishes included within our lines, and that these lines were the Têche on the one side and the Amites on the other, comprehending the parish or city of Orleans, and the neighboring parishes on the Mississippi. To a question propounded to General Banks as to what portion of the State voted, his reply was:

"All as far up as Point Coupée, and there were some men from the Red river who voted at Vidalia."

And in his statement he announces that—

"The city of New Orleans is really the State of Louisiana."

In 1860 there were 357,629 whites in the State, of whom 149,063, or much [illegible] were in New Orleans, so that in no legitimate sense can it be

said that it constitutes the State. It is incredible that there are not many loyal men, the test of loyalty being the willingness to take an oath of allegiance, who were entitled to suffrage upon the question of the formation of their government, but who, from the control of the public enemy, had no opportunity to vote. But assume the statement to be true, it is in evidence that there are not less than 13,000 registered and qualified voters in the city of New Orleans alone who have taken the oath prescribed by the proclamation of the President, and the vote cast at the ratification and the election for members of Congress demonstrates that not more than one-half the number of those entitled to vote in that city voted at that election, to say nothing of the residue of the State.

In the suggestions presented by General Banks to the Judiciary Committee of the Senate, he attempts to account for the meagre vote by the operation of three causes:

1st. By the fact that no opposition to the constitution was manifested in public or private, and no special effort on the part of its friends was required to secure its adoption.

2d. That, from the fact that much uncertainty existed as to the probable ratification of the form of government by the Congress of the United States, deterred many persons from supporting it who would gladly have done so had they known it to be in accordance with the wishes of the government; and,

3d. From the belief that it was possible that the rebel authority in this State might hereafter be established, when persons participating in the reorganization would suffer in consequence of that act.

These last considerations affected many perfectly well disposed and naturally loyal but timid persons.

Had a contest upon the constitution been made by the opponents of emancipation, and had it been generally understood that the authority for organization would have been approved by the government of the United States, the vote in this election would not have been less than 15,000.

As to the cause first assigned, without intimating that General Banks does not speak according to his belief, in view of the testimony of Messrs. Field and Parker, who were doubtless better informed, the undersigned must be permitted to doubt the accuracy or extent of his knowledge; for it is unquestionable that there was much private if not public hostility to its ratification.

The other causes alleged are very striking, as demonstrating not the concurrence of the people, but exactly the reverse, and indicating a settled purpose not to have anything to do with the election. They found very sufficient grounds for not participating, and the undersigned suggest that they are fatal to the reasoning of General Banks.

Mr. Field felt the force of the objection on that point and endeavored to avoid it. In accounting for the paucity of the vote, he says:

It may be asked, and with some propriety too, why did we not poll a larger vote? That was beyond our control. You see, the party representing the McClellan interest refused to vote. They would have no participation in the election. The party representing the interest of Mr. Durant would not vote for what they called a bogus government. We could not force them to vote. They were qualified, for they had taken the oath of allegiance.

Luther V. Parker, also, speaking in relation to the canvass, gives his experience and the result of his observation:

The election was as fully canvassed as any, and those who wanted to speak and oppose the adoption of the constitution spoke as freely as they would at any other time or place. I was one of the speakers at the election for members of Congress, and I know the contest was a sharp one. There were all the elements of opposition brought to bear that could be, and in every shape and form. The only thing that we had trouble with was, that there were certain parties there who would not vote either one way or the other.

Question by Mr. Dawes. Why?

Answer. They would not give any reason why.

Question. Were they parties professing to be loyal?

Answer. Parties reputed to be loyal, and we had no reason to believe them to be disloyal.

Question by Mr. Smithers. What proportion of such men was there?

Answer. I cannot tell.

Question. Was the number large or small?

Answer. Pretty large.

Question by Mr. Dawes. Who represented those men who declined to participate in the election?

Answer. I understood Durant and Fellows, and a few such men.

It is true that General Banks, in his statement, says, in reply to the question as to what portion of the loyal people of Louisiana are represented by the views which Mr. Durant entertains—

"There are not enough to appear at the polls. It is a party of chieftains without an army."

But it is manifest that these who are better acquainted with the facts place a higher estimate on their numerical strength, since they allege their defection as one of the chief reasons for the smallness of the vote.

General Banks, in his statement to the Senate committee, estimates the number of registered voters within the Union lines at from 15,000 to 18,000; so that not more than one-half participated in the erection of the new government, even of those within the lines actually held by the army, to say nothing of those who lived in all the State of Louisiana lying without our occupancy, and this, too, upon the supposition that every vote that was cast was in favor of ratification.

But it is argued that, having an opportunity to vote, their refusal to avail themselves of the privilege was the fault of the recusants, and that they are bound by the acts of those who exercised the power of suffrage.

From this proposition the undersigned wholly dissent. Whatever force the suggestion might have in the case of the choice of representatives or other officers chosen at an election established by and held in conformity with an existing law prescribing such election, they are unable to perceive its application to the creation of a government and the adoption of a constitution emanating and deriving its sanction from the original action of the people, much less to an election ordered by the military power without warrant of law. On the contrary, it was, in their judgment, requisite to the establishment of such government that it should have received the support and sanction of a majority of the loyal people of Louisiana.

In his statement to the committee General Banks directs attention to the topography of the State of Louisiana, for the purpose of establishing the fact that the lands capable of production are along the river banks, and that the larger portion of arable and therefore inhabited lands are within the Union lines, suggesting thereby the presence of population.

Unless he intended this inference, it is difficult to discover the pertinency of the allusion or the value of his observations in this behalf. In this suggestion he has been even more unfortunate than in relation to the number of votes.

By computation from the photographed map furnished to the committee, it appears that within the lines nominally held by the Union arms there are 982,714 acres of improved lands, while in the parishes wholly outside, and over which there is no pretence of control, there are 1,574,307 acres. This result is produced upon a calculation most favorable to the claimants, since it embraces parishes, such as Rapides, Concordia, Catahoula, Avoyelles, and St. Martin's, which, while nominally within our lines of control, are really abandoned. From this computation the parishes of Bienville without and Assumption and St. Bernard within our lines are excluded, no data concerning them being furnished by the map.

Without pursuing this branch of the investigation further, the undersigned suggest that the first question should be negatively answered, and that, in view of the facts, it may be truly averred that the people of Louisiana did not participate or concur in the establishment of the government presented for recognition.

The second question is, whether the government pretended to be formed was [redacted]he result of the voluntary act of the people of Louisiana, unprocured by [redacted]'ary interference.

This will be best answered by the history of its establishment, by the views of its authors, and its actual capability to effect the purposes for which civil governments are created.

It is testified by Major General Banks, and admitted, that the duty of organizing a government in the State of Louisiana was committed by the President to General Shepley, then military governor of New Orleans, and to Thomas J. Durant, an eminent citizen of that city; that, in pursuance of the power thus vested in them, they proceeded to some extent in the enrolment of voters and in developing sentiments of loyalty among the inhabitants. The work of reorganization not proceeding with sufficient rapidity to satisfy the Executive, in December, 1863, General Banks received a letter from that functionary, expressing his disappointment at the development of loyal feeling, and calling upon him to communicate the reason. To this letter General Banks replied that he could not explain the cause, but that if the President desired an enrolment of the loyal people, or a government organized, it could be done, and if the Executive would give him directions he would do it immediately. In answer to this proffer authority was conferred upon him to take such measures as he thought necessary to organize a loyal free State government by the people of Louisiana, without other suggestion or limitation.

The authority committed to the former agents of the President was revoked, and the trust was broadly and unrestrictedly confided to the major general commanding the department of the Gulf, the military representative of the commander-in-chief, ruling with absolute authority over the State to be reorganized, and of which State he declared that "the fundamental law was martial law." In pursuance of the authority, in execution of the trust, and in assurance of a complete redemption of the pledge made to the President, General Banks, on the 11th of January, 1864, issued an order for the election of State officers and indicated the 22d of February as the day of election, and subsequently, in consummation of the object with which he was charged, issued another order to which the undersigned call attention. In that order the following language is used:

> Those who have exercised or are entitled to the rights of citizens of the United States will be required to participate in the measures necessary for the re-establishment of civil government. It is, therefore, a solemn duty resting upon all persons to assist in the earliest possible restoration of civil government. Let them participate in the measures suggested for his purpose. Opinion is free and candidates are numerous. Open hostility cannot be permitted—indifference will be treated as crime and faction as treason.

The undersigned regret that they have not a copy of the official order, but they have no doubt of the correctness of the quotation, as it is fully confirmed by the statement of Major General Banks before the committee. He thus speaks in relation to the election, and the orders issued by him relative thereto:

> I appealed very strongly to the people to take a part in the election. I thought it was necessary, and I said what I thought was right—that the loyal citizen who refused to take any part in the measures necessary for re-establishing the authority of the government of the United States, or in its political institutions, could not be considered loyal, and had not an absolute claim to remain there. But it was never said to any man, "You must vote:" "You shall vote; if you do not you shall be sent away." That idea was never enforced.

Let it be remembered that the question was not concerning the enforcement of obedience to the laws of the United States, it was not concerning the repression of hostility against its authority, but concerning the reorganization of their State government and the election of their municipal officers, which they had the absolute right to determine, and to which freedom of opinion and action was essential.

Let it also be remembered that, in his letter to the President, General Banks had declared that he could and promised that he would reorganize a State government in Louisiana; and that the purpose being so declared, the agent to

effect it was the military commander, vested with complete control over the lives and fortunes of the voter, and holding in his hands the terrible enginery of martial law.

In view of these facts, it appears to the undersigned to be the veriest sophistry to declare that "it was never said to any man, 'you must vote.'"

The order finds its counterpart in the letter of Mason to the Virginia electors, with the additional incentive to obedience that the major general had at his command all the machinery of military commissions, provost marshals, and files of bayonets, to enable him to carry his threat of banishment into speedy and unappealable execution.

It is no answer that he did not do it—it is no palliation that he did not mean to do it—the threat was clear and unequivocal, the power to enforce it was present, and no man but the major general himself could venture to determine that he would not execute it. The invitation was irresistible; the effect inevitable: people voted; Hahn was declared elected, and the promise of the major general thus far redeemed.

Immediately following the gubernatorial election, an order issued from the same inexorable authority commanding the choice of delegates to a convention, appointing the day of election and the time and place of its assemblage. In pursuance of this command, delegates were chosen, and the first paragraph of the record of the debates indicates their judgment as to the source of their power. This journal commences by the statement:

This day being fixed by the general order of Major General Nathaniel P. Banks, commanding the United States forces in the department of the Gulf.

At a subsequent stage of their proceedings, on page 614 of the same journal, one of the most active and apparently influential members, afterwards elected a senator and now applying for admission, arguing their capacity to punish for an alleged contempt, thus defines the origin and power of the convention:

We are not only a convention of the State of Louisiana, but a military power—created and emanating from no other source than the military power, and existing by virtue of civil authority of the government of the United States.

With such high origin and unlimited power, it is somewhat ludicrous that it was powerless to arrest a simple citizen, but was compelled to request of General Banks to issue his order directing his provost marshal to take measures necessary to enable the sergeant-at-arms to bring a newspaper editor before the convention. So wholly dependent were they on the military authority, and so open in their acknowledgment, that they assembled at the command and sat in the shadow of the sword of the major general commanding the department of the Gulf.

Such and so directly under the instigation of General Banks being the reorganization of the pretended government, the undersigned invite attention to the question whether it is capable to fulfil the legitimate objects of its creation—the protection of the citizen in the enjoyment of his civil rights, in the maintenance of commercial intercourse, and the punishment of offenders against its own laws.

How far it is effective for the former will be manifest from an order issued by command of Major General Hurlbut, so late as December 21, 1864, and signed by Harai Robinson, colonel 1st Louisiana cavalry and provost marshal general The order is in these words:

Special Order No. 145.

1. The military approval on permits for plantation, family, and trade store supplies, when such permits do not exceed two hundred and fifty dollars, will in future be signed by order of the provost marshal general, by a commissioned officer on duty at this office. This signature shall be valid for military posts and for the following parishes: St. Bernard, Plaquemines, Orleans, Jefferson, St. Charles, St. John Baptist, St. James, Lafourche, Terrebonne, and as much of Assumption and St. Mary as may be within our military lines.

So utterly unready are the people of Louisiana for civil government, that it is not permitted to the inhabitants to traffic even for family stores without a

ilitary permit, within the parishes considered most loyal, and of these parishes ıere are only nine within the whole State in which such permit is available.

If such be its condition as to commercial intercourse among its own citizens, ıe undersigned suggest that the government is placed in even a more absurd ;ew as to its helplessness in assuring protection by the punishment of offenders ;ainst its own laws. In proof of this they ask attention to the following order sued by command of Major General Hulbut, dated December 27, 1864:

Special Order No. 349.

3. Upon the official report of the attorney general of the State of Louisiana that the ordi-ıry courts of justice are insufficient to punish the offenders named by him, and in consider-ion that the State government and courts of Louisiana owe their present existence to ilitary authority, it is ordered that Michael De Courcey, Benjamin Orr, E. McShane, Y. M. obinson, A. G. Pierson, and B. Wadsworth, for peculation and other offences, be sent for al before the military commission now in session in the city of New Orleans, and of which rigadier General B. S. Roberts, United States volunteers, is president, and that the attorney ıeral of the State of Louisiana be admitted to appear before said commission as public osecutor.

What a conclusive refutation of the allegation of the existence of a govern-ent capable to maintain itself, and to fulfil the conditions of its establishment, ıd how absolute the proof as to the regard in which it is held by the military ıthorities! The attorney general of the State supplicates the major general supplant the majesty of the law, and to erect a military commission to try fences properly cognizable by the ordinary criminal tribunals; and with cool ımplacency General Hurlbut accedes to the request, in consideration that the tate government and courts owe their existence to military authority, and aciously permits the law officer to appear before the military commission to osecute offences against the municipal code of Louisiana!

Surely it is mockery to designate such a government by the name of republic, to dignify such a community with the title of a State.

Two points are pressed by General Banks with much earnestness as induce-ents to recognition:

1. The propriety of recognition as tending to develop loyal sentiments.
2. The danger that the inhabitants will invite French intervention.

With due respect, the undersigned fail to perceive the force of these sugges-ıns.

Loyalty in Louisiana, in the main, consists of mere submission to the power ıving the present ascendency. It is clearly and truly stated by General Banks at little reliance is to be placed on an oath of allegiance as a test of fidelity, ıd it is notorious that the major portion of those within the Union lines, and arly all the delegates to the convention, took the oath of allegiance to "the onfederate States," and so long as their power was maintained in Louisiana, ther voluntarily or compulsorily, demonstrated their faithfulness by obedience. pon the occupation of New Orleans by the Union forces the same persons, ith equal readiness, took the oath prescribed by the President's proclamation, ıd so long as we hold occupancy and control will remain faithful; but no nger. Should the rebel arms again prevail there, the great body will succumb ıd relapse into acquiescence in its supremacy.

The only effective mode is to suppress the rebellion in the State—to destroy e government at Shreveport—to take permanent occupancy of the country, d give such assurance of protection as will enable the people to rest secure their demonstrations of fidelity. This is not to be done by the creation or cognition of improvised or impotent civil governments, but by the steady vance of the army, bringing the inhabitants under our permanent control.

When this shall have been done, the work of restoration and reorganization ll be desirable and easy of attainment. Until it shall have been accom-ished all schemes of reconstruction are futile, resulting only in the creation of *asi* civil governments, wholly subject to military authority, and incapable of rnishing protection or insuring respect.

The suggestion of French interference and apprehension for the safety of New Orleans savors of the argument *ad captandum*.

The undersigned will be permitted to observe that France is affected by no consideration of the presence or absence of civil government in Louisiana. Without underrating the importance of the city of New Orleans or the navigation of the Mississippi, they suggest that their safety is better insured by naval armaments, well-appointed fortifications, and the bayonets of our gallant soldiers, than by the unsubstantial sovereignty vested in Governor Hahn. Foreign intervention has been prevented, not by considerations of national morality or the arts of diplomacy, but by the manifestation of the power and energy of the people of the United States, by her stupendous resources, by her wonderful invention in the perfection of the enginery of war, and by the prowess of her army and navy, rendering doubtful, if not desperate, the issue of any conflict on land or sea.

These are the instrumentalities upon which we must rely, not only for the safety of New Orleans but for the final suppression of the rebellion, until which time the question should be, not how soon States shall be reorganized and members be admitted on this floor, but how they shall be restrained from setting up governments without a people, and proposing representatives without constituencies, to the danger of feeble legislation and the detriment of the republic.

In view of these facts elicited by the investigation of the matter committed to them, the undersigned submit the following resolution, dissenting from the report of the majority of the committee:

Resolved, That M. F. Bonzano, claiming to be a representative from the first congressional district of Louisiana, is not entitled to a seat in this house as a member thereof.

N. B. SMITHERS.
CHAS. UPSON.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 17, 1865.

Mr. DAWES, from the Committee of Elections, made the following report:

The election upon which Mr. Field claims the seat was held on the 5th of September, 1864. The number of votes cast was—

For A. P. Field	1,377	votes.
For A. P. Dostie	1,023	"
Total	2,400	
Majority	354	

This district comprises that portion of the fourth representative district of the parish of Orleans which is included between St. Louis, Rampart, and Canal streets and the Mississippi river; the first, second, and third representative districts of the parish of Orleans, and that portion of the tenth representative district of the parish of Orleans which is known and designated by existing statutes as the tenth ward of the city of New Orleans.

This election, like that of Mr. Bonzano, heretofore reported upon, (Report No. 13, H. of Reps.,) depends for its validity upon the effect which the House is disposed to give to the efforts to reorganize a State government in Louisiana, which have been laid before the House in that report. For the facts connected

with those efforts, and the conclusions of the committee upon the same, they respectfully refer to the report in that case, which, to that extent, they desire to make a part of this report.

The committee report the following resolution, and recommend its adoption:

Resolved, That A. P. Field is entitled to a seat in this house as a representative from the second congressional district in Louisiana.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 17, 1865.

Mr. DAWES, from the Committee of Elections, made the following report:

The election in this case was held on the 5th of September, 1864. The number of votes cast was—

For W. D. Mann	1,908
All others	100
Total	2,008

This district comprises that part of the tenth representative district of the parish of Orleans which is known and designated as the eleventh ward of the city of New Orleans, and the parishes of Jefferson, Washington, St. Tammany, St. Helena, Livingston, St. Charles, St. John the Baptist, St. James, Ascension, East Baton Rouge, East Feliciana, West Feliciana, Terrebonne, and Lafourche.

The principles involved in this case are the same which have been considered at length in the report upon the case of Mr. Bonzano, of the first district, to which the House is respectfully referred.

The committee recommend the adoption of the subjoined resolution:

Resolved, That W. D Mann is entitled to a seat in this house as a representative from the third congressional district in Louisiana.

THIRTY-EIGHTH CONGRESS, SECOND SESSION.

T. M. JACKS and J. M. JOHNSON, *of Arkansas.*

The House refused to consider these cases. The committee reported in favor of the claimants.

IN THE HOUSE OF REPRESENTATIVES,

FEBRUARY 17, 1865.

Mr. DAWES, from the Committee of Elections, made the following report:

There seems in Arkansas at all times to have been a large number of unconditional Union men. It is evident that the so-called secession ordinance was not passed in accordance with the wishes of the people of the State. The convention elected in 1861 was largely Union, but, without instructions from the people, passed the ordinance of secession.

After three years of war and desolation, the loyal people of Arkansas assembled in convention at Little Rock in January, 1864. The result of the con-

vention's deliberations was the amending of the State constitution, the appointment of a provisional governor, lieutenant governor, and secretary of state, and the designation of the 14th, 15th, and 16th days of March as the time for holding a general election throughout the State.

The acts of this convention, judging from the statements of its members, were rather suggestive than obligatory. Indeed, it did not claim its acts as binding until they were ratified by the people, which was done with a unanimity seldom met with. At the election on the 14th, 15th, and 16th of March the acts of the convention were approved by 12,177 voters, while they were disapproved by only 226. At that election the people of more than forty counties elected State and county officers necessary to set to work again the machinery of a loyal State government which had been overthrown by the rebellion in the month of May, 1861.

On the 18th of April, 1864, the State government was formally inaugurated, since which time it has been struggling for an existence under difficulties which those who are strangers to its trials cannot properly appreciate.

The amended constitution differs from the constitution of the State before the rebellion in but a few important particulars.

1st. It forever prohibits slavery or involuntary servitude, which it does in the following words, viz:

[Extract from the present constitution of the State of Arkansas.]

ARTICLE V.—*Abolishment of slavery.*

SEC. 1. "Neither slavery nor involuntary servitude shall hereafter exist in this State, otherwise than for the punishment of crime, whereof the party shall have been convicted by due process of law; nor shall any male person arrived at the age of twenty-one years, nor female arrived at the age of eighteen years, be held to serve any person as a servant, under any indenture or contract hereafter made, unless such person shall enter into such indenture or contract while in a state of perfect freedom, and on condition of a *bona fide* consideration received, or to be received" for their services.

"Nor shall any indenture of any negro or mulatto hereafter made and executed out of this State, or, if made in this State, when the term of service exceeds one year, be of the least validity, except those given in case of apprenticeship, which shall not be for a longer term than until the apprentice shall arrive at the age of twenty-one years, if a male, or the age of eighteen years, if a female."

It also provides for the office of lieutenant governor, an office not known to the old State constitution.

The supreme judges of the State are, under the amended constitution, elected by the people; under the old they were chosen by the legislature. There are some other trifling differences relating to the trial for cases of assault and battery, the amount of claims that may be tried before a justice's court, &c.

The preamble to the constitution repudiates emphatically the rebel debt of the State, and declares null and void all acts of rebel magistrates done under the authority of the rebellion, save the solemnization of matrimony, the act of conveyancing, and others of similar nature provided for under like circumstances under the common law. The convention also provided that all laws and parts of laws in force in the State prior to the sixth day of May, A. D. 1861, and not inconsistent with the amended constitution, should be in full force and effect as before the rebellion.

The governor elect was duly and formally inaugurated on the 18th April. The legislature, composed of senators and representatives from more than forty of fifty-five counties in the State, met at the State capitol, on the 11th of April, and each house organized with a quorum present during the first week of the session.

The legislature remained in session to the 1st of June, when they adjourned until the first Monday in November, at which time they again met, and continued in session to the 1st of January of the present year, when they again adjourned until the 1st January, A. D. 1866.

During the session of April and May, 1864, the legislature elected two United States senators, to fill the unexpired terms of Wm. K. Sebastian and Dr. Mitchell, senators from that State previous to the commencement of the rebellion.

During the said session of the legislature they passed an act defining the qualification of voters, which shows most clearly that they entertain no sympathy or fellowship with the rebellion. The sixth section of that act is in the following words:

And be it further enacted by the general assembly of the State of Arkansas, That each voter shall, before depositing his vote at any election in this State, take an oath that he will support the Constitution of the United States and of this State, and that he has not voluntarily borne arms against the United States, or this State, nor aided, directly or indirectly, the so-called confederate authorities, since the eighteenth day of April, A. D. 1864, (the day the governor was inaugurated,) said oath to be administered by one of the judges of the election; and this act shall take effect from and after its passage.

This act shows a commendable prudence on the part of the legislature to guard the ballot-box against the disloyal part of the people. While the constitution makes no provision against returned rebels who were once citizens of the State, this prompt legislation shows that the people are determined to guard themselves in the future against those who have well-nigh ruined their State in the past.

Arkansas has given another proof of her loyalty and devotion to the United States which should not be overlooked. From evidence which your committee have no disposition to discredit, it appears that Arkansas has furnished at least ten thousand volunteer soldiers for the United States armies. These men are to-day either filling a soldier's grave, or the ranks of their country's armies.

At the election in March, 1864, the people of the 1st congressional district elected T. M. Jacks as their representative in Congress by a vote of about three thousand. The 2d district elected A. A. C. Rogers by a large majority over his competitor. The 3d district, J. M. Johnson, by a very large majority.

The first district is composed of the following named counties: Arkansas, Conway, Crittenden, Craighead, Fulton, Greene, Independence, Izard, Jackson, Lawrence, Mississippi, Monroe, Philips, Poinsett, Prairie, Randolph, St. Francis, Searcy, Van Buren, and White. These counties by their returns show that in the presidential election in 1860 they cast 16,841 votes. Fourteen of these counties, viz: Arkansas, Conway, Crittenden, Fulton, Independence, Izard, Jackson, Lawrence, Monroe, Philips, Prairie, Randolph, and Van Buren, which participated pretty fully in the election of March, cast the aggregate vote of 3,000. These counties in 1860 gave 14,005 votes; the six counties not voting, or voting to only a very limited extent, in the election of March, to wit: Craighead, Greene, Mississippi, Poinsett, Searcy, and St. Francis, gave in 1860 2,836 votes; these, under the ratio of the vote cast in the eleven counties that did vote, should have given about 537 votes at the March election. Of the 3,000 votes cast in this district for member of Congress, T. M. Jacks received all but *fifteen*.

In the second district, composed of the counties of Ashley, Bradley, Calhoun, Chicot, Clark, Columbia, Dallas, Desha, Drew, Hempstead, Hot Springs, Jefferson, Lafayette, Ouachita, Pulaski, Saline, and Union, your committee have not been able to satisfy themselves as to the vote cast; the evidence going to show that in this district the vote was respectable as compared to the whole vote of the State—that some four or five counties did not vote in the election, and that the vote of the counties of Jefferson and Pulaski was relatively large.

In the third district, composed of the counties of Benton, Carroll, Crawford, Franklin, Johnson, Madison, Marion, Montgomery, Newton, Perry, Pike, Polk, Pope, Scott, Clark, Sebastian, Sevier, Washington, and Yell, the vote in March was a tolerably full one, all except the county of Perry participating in the election.

In this district the vote for representative in Congress was nearly five thousand, of which vote J. M. Johnson received over four thousand. These counties in 1860 gave an aggregate vote of 16,932.

The position taken by the committee in the case of Mr. Bonzano, of Louisiana, will apply with equal force to these cases from Arkansas. In the report in that case the committee say:

This election depends for its validity upon the effect which the House is disposed to give to the efforts to reorganize a State government in Louisiana, which have here been briefly recited. The districting of the State for representatives, and the fixing of the time for holding the election, were the act of the convention. Indeed, the election of governor and other State officers, as well as the existence of the convention itself, as well as its acts, are all parts of the same movements.

It is objected to their validity, that they neither originated in nor followed any pre-existing law of the State or nation. But the answer to this objection lies in the fact that, in the nature of the case, neither a law of the State nor nation to meet the case was a possibility. The State was attempting to rise out of the ruin caused by an armed *overthrow* of its laws. They had been trampled in the dust; and there existed no body in the State to make an enabling act. Congress cannot pass an enabling act for a State. It is neither one of the powers granted by the several States to the general government, nor necessary to the carrying out of any of those powers; and all "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, *or to the people*." It is preposterous to have expected at the hands of the rebel authorities in Louisiana that, previous to the overthrow of the State government, they should prepare a legal form of proceeding for its restoration. In the absence of any such legal form prepared beforehand in the State, and like absence of power on the part of the general government, under the delegated powers of the Constitution, it follows that the power to restore a lost State government in Louisiana existed nowhere, or in "the people," the original source of all political power in this country. The people, in the exercise of that power, cannot be required to conform to any particular mode, for that presupposes a power to prescribe outside of themselves, which it has been seen does not exist. The *result* must be republican; for the people and the States have surrendered to the United States, to that extent, the power over their form of government in this, that "the United States shall guarantee to every State a republican form of government."

It follows, therefore, that if this work of reorganizing and re-establishing a State government was the work of the people, it was the legitimate exercise of an inalienable and inherent right, and, if republican in form, is entitled not only to recognition, but to the "guaranty" of the Constitution.

The committee recommend to the House for its adoption the subjoined resolutions:

Resolved, That T. M. Jacks is entitled to a seat in this house as a representative from the first congressional district in Arkansas,

Resolved, That J. M. Johnson is entitled to a seat in this house as a representative from the third congressional district in Arkansas.

WASHINGTON CITY, D. C., *May* 10, 1864.

SIR: Permit us to present to you, and through you to the committee of which you are chairman, the accompanying statement, detailing a condensed history of

Secession and Reorganization in Arkansas.

A majority of the voters of Arkansas were opposed to secession at the election on the 18th of February, A. D. 1861, for members to a convention. There were in that election about 11,000 majority of Union votes cast, and about 9,000 voters did not go to the polls. It may safely be assumed that all who stayed away from the election were Union men. The secessionists mustered their full strength, while Union men, not realizing the threatened danger, were disposed to treat this election as rather a farce than as the fearful reality it has since proved to have been. That election, allowing for several secesh conventions between the day of the election and the meeting of the convention, returned *thirty-four secessionists and forty Union men*. The convention remained thus divided during its boisterous session of the month of March. It finally adjourned subject to the call of its president, having accomplished nothing save that it did agree to refer the entire question of Union or secession back to the people, to be voted upon the ensuing August. Soon after the adjournment of the convention Sumter was fired upon: Mr. Lincoln issued his proclamation calling for 75,000 men: the president of the adjourned convention, by proclamation, convened said convention early in May; on

the 6th an ordinance of secession was passed, and immediately thereafter the convention despatched its commissioners to Montgomery, Alabama, to ally the State with those forming the new confederacy. This was done without at all consulting the people, and thus was inaugurated a reign of desolation, terror, and blood, the like of which the world has seldom if ever seen. Men of little practical worth, and of less morals than worth, became the apostles of this new doctrine; they belabored the people at every town, hamlet, by-place, and country cross-road, or dram-shop. They descanted at large upon the glories, the magnificence, the uncomputed wealth, the surpassing grandeur of a southern confederacy; the laborer of to-day under the old government was to be a nabob, a moneyed prince of the new confederacy; he that hesitated, that doubted, that could not realize all that was told him, and more, was a submissionist, a coward, a traitor, a fogy, a fool, a fit associate only for the ascetic, cold, plodding, heartless, soulless northerners, whose treachery and crimes were painted darker than Erebus. Such an one should not dare think of mingling in the society of the élite, dashing, chivalrous southerner, in whose veins flowed the best blood of all nations, and whose transcendent virtues were plucked direct from the throne of the Eternal. Indeed, the devil never labored half so hard to beguile mother Eve as did secessionists to deceive Union men.

Volunteer soldiers were called for to fight the battles, if battle should be needed, of this "golden government." There, however, was to be no fight; the "vandal hordes" were to quail and flee before southern daring. But fluent declamation and beautiful imagery could not stultify a large portion of the practical, thinking, patriotic Union men of Arkansas; they would not volunteer into the new service. For their benefit the confederate conscription of May, 1862, was most graciously tendered. By this they were *forced* into the army or compelled to flee their homes to the swamps or mountain fastnesses, there to be hunted down like wild beasts by devils and hounds. By the rigor of the confederate conscription the State was almost depopulated of men until the people were relieved by the federal armies.

There were several regiments and parts of regiments of Arkansas troops raised prior to General Steele's occupation of Little Rock, details of which can be furnished if needed.

In September, 1863, General Steele occupied Little Rock, and General Blunt Fort Smith. A large portion of the State, by those movements, was rescued from the confederate despotism; the swamps, the canebrakes, the mountain gorges gave up their long-hidden treasures, and, like the fabled hosts of Attila, men seemed to riseas by magic out of the ground, and flock to the standards of Steele and Blunt. There are now between seven and ten thousand true and tried Arkansians bearing arms in the federal service.

Very soon after the federal occupancy of the State the reorganization movement commenced. Large and enthusiastic reorganization meetings were held all over the liberated portion of the State. In November, the third congressional district, composed of the counties of Marion, Carroll, Madison, Benton, Washington, Newton, Pope, Yell, Perry, Johnson, Franklin, Crawford, Sebastian, Scott, Polk, Montgomery, Clark, Pike, and Sevier, elected, by a vote of over 4,000, Colonel J. M. Johnson as a member to the United States Congress. In December, a number of stanch, prominent Union men of the State visited Washington city to see and confer with the President and with Congress, to learn what the State could do or what she ought to do. Early in January, 1864, a convention, composed of delegates from about one-half the counties of the State, assembled in Little Rock. After nearly three weeks' deliberation, they agreed upon a plan of reorganization. They amended, in a few important particulars, the old State constitution, a copy of which, as amended, is herewith forwarded. They appointed a provisional governor, lieutenant governor, and secretary of state. They provided for an election, to be held on the 14th, 15th, and 16th of March, at which election the voters of the State were not only called upon to vote for all State, district, and county officers, but to vote upon the acts of said convention, approving or rejecting the same. While the convention were working at Little Rock, the Arkansas citizens in Washington had not been idle. They had represented to the President the great solicitude of their people at home. The President, not knowing of the action of the convention, ordered Major General Steele, commanding, to have an election in the State, to take effect on the 28th of March There was no previously arranged concert between the Arkansas citizens in Washington and the members of the convention; but so great and all-absorbing was the one grand question, that of State reorganization, that there was not the slightest conflict in the results of their proceedings, save a difference of two weeks' time in the day set for holding the election; and what is still the more remarkable, the day set apart by the President was that first fixed upon by the convention; but upon mature deliberation it was thought that the people could be as well prepared for the election by the 14th as they could by the 28th, and that Arkansas had no time to lose in so important a measure. The President, after issuing his first order for an election, became advised of the action of the convention and immediately countermanded his first order, and instructed General Steele to "keep the convention on its own way" by holding the election on the 14th, 15th, and 16th of March, as provided by the convention. You will perceive that the election in Arkansas was held not only in accordance with the promptings of a general uprising of the Union sentiment of the State, but in obedience to a positive order of the President of the United States.

That election ratified the constitution and ordinances of the convention by a vote of more than 12,000, elected a governor, a lieutenant governor, a secretary of state, an auditor of public accounts, a State treasurer, an attorney general, three supreme judges, three members to Congress, one from each district, as per apportionment under act January 19, 1861, six circuit judges, seven prosecuting attorneys, twenty-three out of twenty-five State senators, and fifty-nine out of seventy-five representatives to the legislature, all of which will more fully appear from the governor's proclamation of April 11, a copy of which is herewith forwarded.

By a reference to dates you will perceive that reorganization in Arkansas commenced several weeks prior to the issuance of the President's amnesty proclamation of December 8, 1863, which was not generally received in Arkansas till some two or three weeks later. The people, though possibly not approving that proclamation in all its details, laid hold of it as an anchor of hope; it infused new life and vigor into the reorganization movement throughout the State.

The people held their elections buoyant with hope, never doubting for a moment the faith of the government, that if they complied with expressed requirements of that proclamation, their acts should be valid and they entitled to all the benefits therefrom arising. The State gave largely more than twice the number of votes required of her in that proclamation, and the votes given were not confined to one or two small and crowded localities. Arkansas has no large cities. She has fifty-five counties; by a reference to the governor's proclamation you will perceive that forty-three of these are represented in the lower house of the State legislature. Her Congressmen were elected each in his own district by a vote bearing a fair ratio to the vote in 1860, as compared with the whole State vote, now compared to the whole vote of 1860.

The first district is composed of the counties of Greene, Mississippi, Craighead, Randolph, Lawrence, Fulton, Izard, Searcy, Van Buren, Independence, Jackson, Poinsett, Crittenden, Saint Francis, White, Conway, Prairie, Arkansas, Monroe, and Philips. These twenty counties in 1860 had a white population of 112,310 persons; allowing one vote for every six persons, the ratio of the presidential vote of the State for that year would give this district a voting population at that time of 18,718. In the election of the 14th, 15th, and 16th March it gave a vote of something more than 3,000, fully one-sixth of the vote of 1860. In this district six counties, Greene, Craighead, Mississippi, Poinsett, Randolph, and Searcy, are not represented in the lower house of the State legislature. The people of these counties were deterred from voting by bands of confederate soldiers in the rear of General Steele.

T. M. JACKS, MEMBER ELECT.

In the counties of the first district not represented in the State legislature there were in 1860 24,681 white persons, representing 4,113 voters, which number subtracted from the whole number, 18,718, leaves no less than 14,605 voters of 1860 represented now in the legislature by the vote of the 14th, 15th, and 16th March.

A. A. C. ROGERS, MEMBER ELECT.

In the second district the counties not represented in the legislature had in 1860 a white population of 24,008, equal to 4,001 voters, which taken from the whole number, 15,096, leaves 11,095 voters of 1860 now represented in the State legislature.

J. M. JOHNSON, MEMBER ELECT.

In the third district—the county of Perry the only one not represented in the legislature—there were in 1860 2,162 white persons, making 360 voters; these taken from 20,298 leave 19,938 voters of 1860 now represented in the State legislature.

The second district is composed of the counties of Pulaski, Saline, Hot Springs, Jefferson, Dallas, Bradley, Drew, Desha, Chicot, Ashley, Calhoun, Union, Ouachita, Columbia, Hempstead, and Lafayette. This district in 1860 had a white population of 90,562, giving, for the same time, 15,096 voters; this district returned its member by a vote of more than 2,000. In this district the counties of Ashley, Chicot, Columbia, Desha, and Union have no representatives in the legislature.

The third district, composed of the nineteen counties before mentioned that elected Colonel Johnson to Congress in November, 1863, had in 1860 a white population of 121,788, giving, as per ratio adopted, 20,298 voters at that time. They now give a vote of more than 5,000. All the counties of this district are represented in the legislature, except Perry.

Of the voters of 1860, we think we are safe in saying that more than one-half of them have been forced from the State or into the rebel armies. Of those remaining in the State, and not in the confederate armies, we think fully one-half voted; and of those who have *proved* their loyalty by voluntarily subscribing the President's amnesty oath, more than four-fifths of them voted.

The legislature met in Little Rock on Monday, the 11th of April. The senate organized on Tuesday, with seventeen members present; the house not till Friday, there not being a

quorum in attendance until that day. The two houses have been regularly in session ever since. The latest intelligence we have from them they had chosen one United States senator, and were balloting for the other. The governor, Isaac Murphy, was duly and formally inaugurated on Monday, the 18th April. All the other officers of the State have been qualified and properly inducted into office. County and township officers, such as sheriffs, clerks, county and probate judges, treasurers, coroners, school commissioners, internal improvement commissioners, justices of the peace, and constables, were elected at the late election for most of the counties. For those that could not hold their elections in March there is ample provisions made, as you will see by a reference to the schedule appended to the constitution.

You will thus perceive that the machinery of our State is fully at work; that it is as yet a little *rough*. That it needs a little "grease," we, as well as any one else, do know; but that the earnest will and the indomitable energies of the people will make it "go" is not to be questioned by any one cognizant of the facts, for a moment.

In conclusion, permit us to say in behalf of our people, that Union men in Arkansas have suffered what the world may imagine, but can never know; they have passed through ordeals of sophistry and lies, fire and sword, pestilence and famine, terror and blood, and to-day they stand forth the purified monuments of constancy and patriotism, willing still to make further sacrifices for country and principle. We present them to you, believing them worthy your most earnest and serious consideration. We present them as true men, not as quasi secessionists; not as half-reclaimed rebels. They know that by the terrible convulsions of the last three years the pride of their State has been humbled, but they suffer no man to insinuate that their honor has been compromitted or themselves thereby disgraced. They feel but too keenly the pierce of this barb, perhaps unintentionally but too often hurled at them by men whose good fortune it has been to live where loyalty was fashionable—where loyalty was popular. Permit us to say for our people, that none but the southern Union man can ever know the highest cost of loyalty. From our more fortunate brothers we expect all the rights, franchises, and amenities due American citizens. We ask nothing more; we are willing to receive nothing less. We come not as paupers, asking charity, but as equals, claiming justice.

Hoping this condensed statement may be of service to your committee in arriving at conclusions which shall be alike just and generous to the suffering people whom we have the honor to represent,

We subscribe ourselves, most respectfully, yours,

T. M. JACKS.
J. M. JOHNSON.
A. A. C. ROGERS.

Hon. H. S. DAWES,
Chairman Committee of Elections.

PROCLAMATION.

EXECUTIVE OFFICE, *Little Rock, April* 11, 1864.

In accordance with the provisions of the schedule appended to the constitution adopted by the late convention of the State of Arkansas, I, Isaac Murphy, provisional governor of said State, do hereby make proclamation that, at an election held on the 14th, 15th, and 16th days of March, 1864, the constitution and ordinances of said late State convention were ratified within the meaning of the President's proclamation of December 8, 1863, and that the vote for and against the constitution and ordinances was as follows:

Constitution and ordinances, ratified, twelve thousand one hundred and seventy-seven votes.

Constitution and ordinances, rejected, two hundred and twenty-six votes.

And I further certify that the following named persons were elected to the various offices hereinafter named, to wit:

Robert J. T. White, secretary of state; James R. Berry, auditor of public accounts; E. D. Ayres, treasurer of state; Charles T. Jordan, attorney general; C. A. Harper, T. D. W. Yonley, and Elisha Baxter, supreme judges.

Elected to Congress.—1st district, T. M. Jacks; 2d district, A. A. C. Rogers; 3d district, J. M. Johnson.

Judges of circuit courts elected.—1st judicial circuit, J. M. Hanks; 2d judicial circuit, R. A. Whitmore; 3d judicial circuit, ——— ———; 4th judicial circuit, Thomas W. Pounds; 5th judicial circuit, W. M. Matheney; 6th judicial circuit, ——— ———; 7th judicial circuit, ——— ———; 8th judicial circuit, Elias Harrell; 9th judicial circuit, A. N. Hargrove.

Prosecuting attorneys elected.—1st judicial circuit, J. T. Moore; 2d judicial circuit, R. V. McCracken; 3d judicial circuit, ——— ———; 4th judicial circuit, Joseph Cravens; 5th judicial circuit, S. W. Williams; 6th judicial circuit, ——— ———; 7th judicial circuit, W. B. Pagett; 8th judicial circuit, Thomas H. Patton; 9th judicial circuit, J. R. Steele.

MEMBERS ELECTED TO THE LEGISLATURE.

Senators.—1st senatorial district, E. D. Ham; 2d senatorial district, John McCoy; 3d senatorial district, Jesse M. Gilstrap; 4th senatorial district, Luther C. White; 5th senatorial district, Charles Milor; 6th senatorial district, William Stout; 7th senatorial district, F. M. Stratton; 8th senatorial district, Thomas Jefferson; 9th senatorial district, King Bradford; 10th senatorial district, E. D. Rushing; 11th senatorial district, J. J. Ware; 12th senatorial district, J. M. Lemmons; 13th senatorial district, A. B. Fryrear; 14th senatorial district, T. Lamberton; 15th senatorial district, J. Q. Taylor; 16th senatorial district, Trueman Warner; 17th senatorial district, no returns; 18th senatorial district, I. C. Mills; 19th senatorial district, W. C. Valandigham; 20th senatorial district, R. H. Stanfield; 21st senatorial district, no returns; 22d senatorial district, W. H. Harper; 23d senatorial district, E. W. Gilpin; 24th senatorial district, L. D. Cantrell; 25th senatorial district, E. H. Vance.

Representatives.—Arkansas county, G. C. Cooper; Bradley county, W. W. Scarborough; Washington county, John Pearson, W. H. Nott, M. H. Patton, and —— Waddle; Benton county, R. H. Wimpey, Jesse Shortess; Madison county, T. H. Scott, G. W. Seamans; Carroll county, J. W. Plumley, J. F. Seamans; Newton county, James R. Vanderpool; Crawford county, John Austin, J. G. Stephenson; Franklin county, F. M. Nixon; Johnson county, John Rogers, A. P. Melson; Pope county, Robert White; Marion county, J. W. Orr; Conway county, G. N. Galloway; Yell county, B. Johnson; Van Buren county, L. M. Harris; Izard county, J. B. Brown; Independence county, J. Clabb, A. Harper; White county, J. J. Randall; Jackson county, A. J. McLaren; Lawrence county, Reed Shell, Ephraim Sharp; Fulton county, Simpson Mason; St. Francis county, R. H. Moore, C. S. Stile; Crittenden county, F. Thursby; Philips county, J. A. Butler, J. F. Hanks; Monroe county, E. Wild; Jefferson county, H. B. Allis, D. C. Hardeman; Pulaski county, O. P. Snyder, L. S. Holeman; Prairie county, J. B. Claibourne; Drew county, Wm. Cox, F. H. Boyd; Dallas county, James Kennedy; Ouachita county, J. W. Neill; Calhoun county, E. A. Ackerman; Clark county, J. H. Green; Montgomery county, J. C. Priddy; Pike county, M. Stinnette; Hempstead county, Jas. Bowen, L. Worthington; Sevier county, Jno. Gilcoat, N. Musgrove; Lafayette county, J. C. Hale; Saline county, Warren Holleman; Hot Spring county, Thomas Whitten; Sebastian county, J. R. Smoot, Jacob Snyder; Scott county, Thomas Cauthorn; Polk county, John Wear.

All of which appears of record, according to the poll-books returned and now on file in this office.

In testimony whereof, I, Isaac Murphy, provisional governor of the State of Arkansas, have set my hand, (there being no seal of office.)

Done at Little Rock this day and date above written.

ISAAC MURPHY,
Prov. Governor of Arkansas.

OFFICE SECRETARY OF STATE,
Little Rock, Ark., April 23, 1864.

The above is a true copy of the proclamation on file in this office.

ROBERT J. T. WHITE,
Secretary of State.

CASES

OF

CONTESTED ELECTION

IN

THE SENATE OF THE UNITED STATES.

Several cases are inserted in the following pages which are not, strictly speaking, cases of "contested election." As important legal points were settled in reference to the rights of senators to their seats, they were included for convenience of reference.

TWENTY-FOURTH CONGRESS, SECOND SESSION.

Mr. SEVIER, *of Arkansas.*

Mr. Sevier was elected one of the first senators from Arkansas after the admission of that State into the Union. He was elected in 1836, and according to the rule of the Constitution, and according to practice, he and his colleague had to draw lots to know what class of senators they should be assigned to. In that lottery Mr. Sevier drew the shortest term, which expired on the 4th of March, 1837; so that, having been elected in 1836, he occupied his seat but about a year. After he drew the short term, and before the period arrived at which he would have to retire, the governor of his State, contemplating the vacancy which would happen after the 3d of March, 1837, appointed Mr. Sevier to fill that vacancy. The Senate sanctioned the act of the governor.

Mr. GRUNDY submitted the subjoined report from the Judiciary Committee:

At the last session of Congress the State of Arkansas was admitted into the Union, and the legislature of that State, in the month of October, 1836, elected Ambrose H. Sevier and William S. Fulton senators to represent the State in the Senate of the United States. It also appears that, upon the allotment of the said Arkansas senators to their respective classes, as required by the third section of the first article of the Constitution, the said Ambrose H. Sevier was placed in the class of senators whose term of service expired on the 3d day of March, 1837, and that the legislature of Arkansas have had no opportunity of filling the vacancy, not having been in session since the fact that the vacancy would occur could have been known in that State. The governor of the State of Arkansas, on the 17th day of January last, commissioned the said Sevier as senator, to fill the vacancy which would take place on the 3d of March. Upon this state of the case, the question is presented whether the said Ambrose H. Sevier is entitled to his seat under the appointment made by the executive of the State of Arkansas. In looking into the practice of the Senate upon the

This was agreed to, March 15, 1849. During the contest Mr. Shields tendered his resignation. A motion to accept his resignation was voted down—yeas 12, nays 32. The committee's resolution, as amended by Mr. Calhoun, was adopted without division.

NOTE.—The debate in this case, which is extended, will be found on pages 327, 332, vol. 40 Cong. Globe, Special Session, 1849.

THIRTY-FIRST CONGRESS, SECOND SESSION.

Mr. WINTHROP, *of Massachusetts.*

The sitting member, under executive appointment, has the right to occupy his seat until the vacancy is filled by the State legislature and the credentials of the person so elected are presented to the Senate.

In this case Mr. Winthrop, of Massachusetts, was appointed by the governor of the State to fill a vacancy. Mr. Rantoul was elected by the legislature, and Mr. Winthrop occupied the seat for some time, till Mr. Rantoul appeared and presented his credentials. Mr. Winthrop himself offered the following resolution, which was referred to the Committee on the Judiciary:

Resolved, That the Committee on the Judiciary inquire and report to the Senate, as early as practicable, at what period the term of service of a senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires.

Mr. BUTLER, from the Committee on the Judiciary, to whom was referred the resolution submitted by Mr. Winthrop, made the following report:

The Committee on the Judiciary, to whom was referred a resolution directing said committee to inquire and report at what period the term of service of a senator appointed by the executive of a State during the recess of the legislature thereof rightfully expires, have had the same under consideration, and report:

The question presented by the resolution turns mainly upon the construction of the clause of article 1, section 2, of the Constitution of the United States, which provides that "if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall fill such vacancies."

Your committee are of opinion that the sitting member under executive appointment has a right to occupy his seat until the vacancy shall be filled by the legislature of the State of which he is a senator during the next meeting thereof. To fill such vacancy, it is not only necessary to make an election, but that the person elected shall accept the appointment. And your committee are further of the opinion that such acceptance should appear by the presentation to the Senate of the credentials of the member elect, or other official information of the fact; at which time the office of the sitting member terminates. When the member elect is present and ready to qualify, his express acceptance is at once made known; and when his credentials are presented in his absence, his acceptance may be fairly implied.

These general views are sustained by precedents. An early one may be found in the Senate Journal of 1809, page 381, where the question was settled, after debate, by the adoption, on the 6th of June, of the following resolution:

Resolved, That the Hon. Samuel Smith, a senator appointed by the executive of Maryland to fill the vacancy which happened in the office of senator for that State, is entitled to hold his seat in the Senate of the United States during the session of the legislature of Maryland, which, by the proclamation of the governor of said State, was to commence on the 5th day of the present month of June, unless said legislature shall fill such vacancy by the appointment of a senator, and this Senate be officially informed thereof.

The precedent in this case has been uniformly followed from that time to the present, in the many cases that have arisen involving the same question.

The whole subject was laid upon the table.

NOTE.—The debate upon this case will be found on pages 461, 462, 463, and 464. Cong. Globe, 31st Cong., 2d session.

THIRTY-SECOND CONGRESS, FIRST SESSION.

YULEE *vs.* MALLORY, *of Florida.*

The State legislature may choose its own method for the election of a United States senator. On the first ballot Mr. Yulee, the contestant, received 29 votes, and 29 other votes were given to "blank." Mr. Yulee claimed that as he was the "only qualified person voted for" he was duly elected senator. The committee held otherwise.

IN THE SENATE.

AUGUST 21, 1852.

Mr. BRIGHT, from the select committee to whom the subject was referred, made the following report:

That they have examined the law and the facts connected with this case: they have heard the contestant by able counsel, and the sitting member in person, and after giving to each that consideration which the importance of the questions embraced merits, find that on the 13th day of January, 1851, the general assembly of Florida met in convention of the two houses to choose a senator of the United States to supply a vacancy which would occur before another constitutional session.

The president of the senate presided, and upon a call of the roll, a poll *viva voce* was taken of the members, pursuant to the requirements of the constitution of the State, and twenty-nine responded David L. Yulee, and twenty-nine blank, whereupon the presiding officer declared that no choice had been made; they then proceeded to a second and third vote, with substantially the same result. On the 15th of January they again met in convention for the same purpose, and upon a call of the roll thirty-one members responded R. S. Mallory, and twenty-seven votes for Mr. Yulee and others; whereupon the President declared Mr. Mallory to be duly elected.

Neither the record nor any other evidence in the case shows that objection was made to any of those proceedings, or that their legality was questioned in or out of the convention at the time.

The certificate of election was granted to Mr. Mallory, and he having been qualified, now holds the seat.

Mr. Yulee contests his right to the seat on the ground that he was himself elected at the first vote, because there was a quorum of each house present, as appears by the journals, and he being the only qualified person voted for, had a majority of the legal votes. Those who responded "blank," he contends voted for no qualified person, and waived their electoral rights as effectually as if they had been silent.

Mr. Mallory opposes to this inference a resolution of the two houses adopted in 1845 by concurrent vote, which has never been rescinded, and is in the following words:

Resolved, That a majority of all the members elect, composing the two houses of general assembly, shall be necessary to determine all elections devolving upon that body.

The whole number of members elect was *fifty-nine*, and Mr. Yulee not having a majority of that number was not elected. From the facts disclosed it is quite apparent that the convention took this view of the matter.

In deciding the questions which are raised out of the facts, the Constitution of the United States must, to the extent of its provisions, prevail over all other authority. That instrument gives to each State the right to elect two senators. Article 1, section 4, is in these words: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislatures thereof."

The words of the third section in the same article are: "The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof for six years."

The first question, then, which arises is, what constitutes the legislature of Florida? for that, and that only, has the right to make the choice. The Constitution of the United States, article 1, section 1, says: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." The constitution of Florida declares that "the legislative power of the State shall be vested in two distinct branches, the one to be styled the senate, the other the house of representatives, both together the general assembly." These authorities leave no doubt that the two houses constitute the legislature of Florida, which holds the unqualified right, under the Constitution of the United States, to elect the senators for the State.

Has this body executed the trust confided to it in such a manner as to satisfy the terms of the Constitution? The time, the place, and the manner of holding the election are all to be prescribed by it. To the time and place no objection is made, but the validity of the manner is questioned.

No mode of election is prescribed by the Constitution, but this duty is left to the discretion of the several legislatures of the States. In carrying out the power, some elect by a concurrent vote of the two branches, the one having a negative upon the action of the other; others elect in a convention of the two houses, in which case (as far as your committee are advised) a majority prevails.

If numbers be regarded as a material element in such elections, it is manifest that in the same body of men different results may be produced, according as one mode or the other is pursued. There may be in convention a majority in favor of a candidate, making his success by this mode certain, while with the same number in his favor he might be defeated in one of the houses, if a concurrent vote is required; and such cases have occurred.

Again, it may be observed that the power given to the legislature to regulate the time, place, and manner applies as well to representatives as to senators; and here again are other diversities in the manner of exercising it. Some States elect by a plurality of votes; others by a majority; and others have required at the first trial a majority, and a plurality afterwards. Some again (until Congress made a law upon the subject) elected by general ticket; others either by single districts or districts entitled to more than one, according to convenience. None of those modes of electing senators or representatives have been held unconstitutional, but members have uniformly been admitted to their seats, whether elected in one or other of these modes.

These practices have at all times existed, and have uniformly been recognized as constitutional, proving clearly that the discretion reposed in the

legislature of the States may be exercised in a diversity of ways and yet be a sufficient compliance with the requirements of the constitution.

The legislature of Florida adopted a course different from any of these, by requiring a majority of all the members elect in convention to make choice of a senator. This rule is as unobjectionable and harmonizes as well with the constitution as the modes pursued elsewhere. The right of the State to adopt such a rule has not been directly questioned, but the legality of the means by which it was executed is denied. This point is the chief ground of controversy between the parties. On the one hand, the validity of the resolution above cited is denied; on the other, it is alleged that if the resolution was not in force a usage equivalent to it existed, which was equally obligatory upon the convention. This again is denied.

We will first consider the character, force, and effect of the resolution.

The first objection to it is, that it contains no evidence on its face that it is a *joint act* of the two houses. This is true; but the journals place this matter in the clearest light. While there is an apparent defect in form, there was none in fact. It was passed in one house, sent to the other, and there agreed to by a concurrent vote; it is a clear, unequivocal expression of the will of each house. No words added to it can make it a stronger or more complete expression of that will. It is also in substance joint, since it is the will of both houses expressed in the same words. Moreover, it is permanent, being designed as a rule of action for both, by the united will of both, and it must stand as such until both concur in repealing or rescinding it.

The next objection is, that it has not the forms of law usual in legislation, because it is not signed by the officers of each house, or approved by the governor. It is a sufficient reply to state that the constitution does not require the legislature to regulate the manner of election by *law;* it may be by resolution, either joint or several, or in any other method which commands the agreement of both houses of the legislature. The form of action being discretionary and the substance right, the objection becomes immaterial.

The will of the two houses, when ascertained by vote in their respective chambers, is for this purpose a sufficient law, because they alone are empowered to prescribe the manner of choosing in such mode or by such means as they please. On this point a State constitution can neither control nor modify that of the United States, for the latter is the supreme law.

This resolution being joint in fact, though not in the usual form, was a standing order of the two houses, in force until they by concurrent vote should rescind or modify it. It was consequently the rule prescribing the manner of election to the two houses when they met in convention on the 13th of January, 1851, and they were bound to proceed according to its requirements.

This being the view which the committee take of the case, there is no necessity for pursuing the subject further, since Mr. Yulee did not obtain votes sufficient to elect him. It may not, however, be out of place to observe that the facts disclosed render it evident that the two houses entered the convention with the full belief that no number short of a majority of all the members elect could make a choice of a senator, and conducted their proceeding under the conviction that they were bound to adhere to the established practice. There is also reason for believing that the members of the convention assembled and acted under the conviction that blank votes would be counted, inasmuch as the two houses on a former occasion and in another election had so decided. If blank votes are beyond doubt a nullity; if the resolution is to be regarded of no effect, and we are brought to the question, under these circumstances, whether Mr. Yulee is duly elected, it seems to us difficult to maintain the affirmative of that proposition upon the facts before us. If the members were misled on both of these material points by assuming that their previous doings afford[illegible] certain rules of action, then they were misguided by what they

had a right to consider as authority, and must have acted under a misconception of right which stood, as they supposed, unquestioned. If this be so, they stand substantially in the condition of an elector who votes for a person disqualified, believing him to be qualified. The vote in such a case, though unavailing, is not rejected from the count.

The only remedy which we can see for an election carried on through misapprehension from such well-founded causes, is to set it wholly aside and open the way to a new choice; but in our view of the case there is no occasion to consider what ought to be done upon such a state of facts.

The committee ought perhaps to notice one other fact which has been relied upon. Since the adoption of the resolution, the journals show a case in which a person who was declared not to be elected in convention because he had not the number of votes required, was afterwards declared elected by a concurrent resolution of the two houses. All that need be said of this transaction is, that it passed the Senate through the misapprehension of one of its members, as the journal proves, and was manifestly a violation of the resolution. It is equally manifest that the members of both houses did not regard it as affecting in any way the standing order, for its provisions were at all times subsequently observed as obligatory in convention. No argument is necessary to prove that such an irregular proceeding could have no effect upon the order either to modify or rescind it.

With these views the committee recommend the adoption of the following resolution:

Resolved, That the Hon. Stephen R. Mallory was duly elected a member of the Senate of the United States from the 3d day of March, 1851.

The resolution was adopted without a dissenting vote.

NOTE.—The debate in this case will be found in the Appendix to Cong. Globe, 1st session of 32d Congress, from page 1170 to 1176.

THIRTY-SECOND CONGRESS, SECOND SESSION.

Mr. DIXON, *of Kentucky.*

There was no report in this case, the Senate refusing to send it to a committee. The facts and the law are succinctly stated by Mr. Rusk:

The following facts make up the case: On the 17th of December, 1851, Henry Clay was a senator from Kentucky, chosen by the legislature for six years, which would have expired on the 3d of March, 1855. Being so a senator, he resigned by a communication to the legislature of Kentucky, declaring that it was to take effect on the first Monday in September, 1852. The legislature, then in session, received the resignation, and chose Mr. Dixon to fill the vacancy thus to occur, from the first Monday in September, 1852, to the third day of March, 1855. The legislature then adjourned. On the 29th day of June, 1852, during the recess of the legislature of Kentucky, Mr. Clay died, and the governor of that State made a "temporary appointment" of Mr. Meriwether as a senator from Kentucky, to hold the seat *until the first Monday of September*, 1852. Mr. Meriwether immediately took the vacant seat, and held it until Congress adjourned on the last day of August, 1852. On the 6th of December, 1852, the Senate reassembles, Mr. Meriwether does not appear, and Mr. Dixon appears and presents his credentials, and claims the vacant seat.

Manifestly, Mr. Dixon is one of *two* senators "chosen by the legislature" of Kentucky "for six years," and he was chosen to fill a vacancy which has happened in the term of Mr. Clay.

The whole question turns on the point, How did this vacancy happen? Mr. Clay resigned, fixing the first Monday of September as the day when he should *vacate* his seat, and died, nevertheless, a senator before that day arrived. Mr. Dixon was appointed by the legislature when in session, before not only the day which Mr. Clay's resignation fixed for his retirement, but also before Mr. Clay's death.

We who maintain Mr. Dixon's title insist that the vacancy happened by Mr. Clay's resignation. On the contrary, those who deny Mr. Dixon's title insist that the vacancy happened by Mr. Clay's death.

Four questions arise:

First. Can a senator resign?

Second. Can a senator resigning *appoint a future day for his retirement from the Senate?*

Third. Can the proper appointing power receive such a resignation, and prospectively fill the vacancy?

Fourth. If the legislature so prospectively fill the vacancy, can the appointment be *defeated by the death* of the resigning senator, before the arrival of the day fixed for his retirement from the Senate?

If a senator can resign, and can so resign prospectively, and if the legislature can so fill the vacancy prospectively, and if their action cannot be defeated by the death of the resigning senator, then Mr. Dixon's title is good, valid, and complete.

The first question is expressly decided by the Constitution, which declares that vacancies may "happen by resignation."

The second question is decided by an unbroken succession of precedents from the foundation of the government. Mr. Bledsoe so resigned, fixing a future day; so did Mr. Clay in 1842; so did Mr. Berrien in 1852; and so did Mr. Foote in 1852.

The third question is answered with equal distinctness by precedents. The legislature of Kentucky prospectively filled the vacancy made by Mr. Clay's resignation in 1842; the governor of Georgia prospectively filled the vacancy of Mr. Berrien in 1852; and the governor or legislature of Mississippi prospectively filled the vacancy of Mr. Foote in 1852.

The only question remaining is the fourth: Can the death of the resigning senator after the legislature has prospectively filled the vacancy, and before the day fixed for his retirement, defeat the appointment of his successor already made?

The Senate refused to refer the case to a committee, and declared Mr. Dixon entitled to the seat—yeas 27, nays 16.

NOTE.—The debate in the case occurs on pages 2, 93, 96, Cong. Globe, 32d Congress, 2d session.

THIRTY-THIRD CONGRESS, FIRST SESSION.

Mr. WILLIAMS, *of New Hampshire.*

Mr. Williams having been appointed by the governor of New Hampshire to fill a vacancy, and the State legislature having met and finally adjourned without filling it, it was held by the committee that the right of representation under the appointment had expired.

IN THE SENATE,

AUGUST 2, 1854.

Mr. BUTLER, from the Committee on the Judiciary, made the following report:

Whereas the Hon. Jared W. Williams was appointed by his excellency the governor of New Hampshire, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States, which had happened by the death of the Hon. Charles G. Atherton, a senator, whose term of service would have continued till the 4th of March, 1859; and whereas it is understood that since that temporary appointment was made the legislature of New Hampshire has been convened at their regular session, and has adjourned to the last Wednesday of May next, without filling such vacancy, and that said State still claims a right of representation under said appointment, which the appointee is not at liberty to surrender by his act without the action of the Senate: at his request, therefore,

Resolved, That the subject be referred to the Committee on the Judiciary, to inquire into the facts connected with it, and to make such report as they deem proper to enable the Senate to determine whether the right of representation under said appointment has expired.

Under this resolution the committee are required to inquire into the facts connected with the case, and to make such report as they deem proper, to enable the Senate to determine whether the right of representation under said appointment had expired.

As the question to be determined must depend in a great measure on the proceedings of the legislature and constitution of New Hampshire, the committee submit the following as a part of their report, having a bearing on the case:

COMMUNICATION FROM THE GOVERNOR TO THE LEGISLATURE.

To the Senate and House of Representatives:

I have signed all the bills and resolutions which you have passed the present session and presented for my approval, (except the bills and resolutions which I have returned to the House of Representatives, with my objection thereto,) and having been informed by a joint committee of both branches of the legislature that you have finished the business before you, and are ready to adjourn, by the authority vested in me I do hereby adjourn the legislature to the last Wednesday of May next.

N. B. BAKER.

COUNCIL CHAMBER, *July* 15, 1854.

Constitution of New Hampshire.—Page 23.

The senate and house shall assemble every year on the first Wednesday of June, and at such other times as they may judge necessary; and shall dissolve and be dissolved seven days next preceding the said first Wednesday of June, and shall be styled the general court of New Hampshire.

From the language of the governor's communication to the legislature, it seems to have been his judgment that the session had closed; and from the language of the constitution, it would appear that it will have terminated on the day mentioned, as, by another provision of the constitution, the governor on the same day is required to dissolve the legislature. In this view of the subject, in *proprio vigore*, the legislature had no power of assembling from the time of its adjournment, as announced by the governor, until the last Wednesday of May next, when its existence terminated.

There was a power in the governor, should the general welfare require it, to call the legislature together as an existing body. But when so called together, what would have been the character of such a meeting? Would it not have been a distinct session, carrying with its acts and doings all the incidents of a *separate* session? Such would seem to be a fair inference. This being conceded, then it would follow that the late legislature did adjourn *sine die*, in the legal import of the term. If this is a legitimate conclusion, this case cannot, in any particular, be distinguished from that decided by the Senate in the case of the Hon. Samuel S. Phelps, a senator from Vermont, and the committee refer to that case as the authority for their conclusion in the case under consideration.

In response to the resolution, the committee are of opinion that "the right of representation under the appointment" has expired.

The report was agreed to without division.

NOTE.—The debate will be found in Cong. Globe, 33d Congress, 1st session, pages 2201, 2208, 2209, 2211.

THIRTY-THIRD CONGRESS, FIRST SESSION.

Mr. PHELPS, *of Vermont.*

Mr. Phelps was appointed to fill a vacancy by the governor of Vermont. The State legislature met and adjourned without filling the vacancy. The majority of the committee held Mr. Phelps was entitled to retain his seat. The minority of the committee held to the contrary, and the Senate adopted the resolution of the minority.

IN THE SENATE,

JANUARY 16, 1854.

Mr. PETTIT, from the Committee on the Judiciary, made the following report:

The following is the resolution referred to the committee, to wit:

Whereas the honorable Samuel S. Phelps was appointed by his excellency the governor of Vermont, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States, which had happened by the death of the honorable William Upham, a senator, whose term of six years would have continued until the fourth of March, eighteen hundred and fifty-five; and whereas it is understood that, since that temporary appointment was made, the legislature of Vermont has been convened at their regular session, and has adjourned without filling such vacancy: Therefore,

Resolved, That the Committee on the Judiciary inquire whether the honorable Samuel S. Phelps is entitled to retain a seat in the Senate of the United States. The clauses of the Constitution which bear upon this question may be found in the third section of the first article of that instrument, and reads as follows:

"The Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years; and each senator shall have one vote.

"Immediately after they shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation or otherwise during the recess of the legislature of any State, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies."

The committee do not think that the last clause of article 5 of the Constitution, which provides "that no State, without its consent, shall be deprived of its equal suffrage in the Senate," has any bearing on this question. If a State refuses to appoint two senators by some means known to the Constitution, it does consent to be deprived of its equal suffrage in the Senate. And in such case the Senate cannot supply the deficiency by creating a senator; but it can determine upon the validity of his appointment, whether it comes from the legislature or the executive of the State.

There are two modes by which senators may be appointed, and whether appointed by the one or the other mode they possess the same power and exercise the same rights and privileges and receive the same emoluments. These modes may be called *primary* and *contingent*. The first rests with the legislature and the second with the executive of the State when a vacancy happens in the recess of the legislature.

The committee are of opinion that the framers of the Constitution, in providing these two modes by which senators may be appointed, had in view the obvious propriety, if not necessity, of having two senators from each State, at all times in commission and ready for public service. The committee do not think that the language above quoted, "the executive thereof may make temporary appointments until the next meeting of the legislature," is very perspicuous, definite or concise, in its phraseology or meaning, but, on the contrary, it is subject to two constructions. By one of these constructions both the power to appoint and the term of office of the appointee would terminate upon the *meeting* of the legislature, and thus leave the State for some days, until the legislature could appoint and the new senator reach the seat of government, without an "equal suffrage in the Senate," a condition which the committee think it was the intention of the constitutional convention to avoid. "The executive thereof may make temporary appointments until the next meeting of the legislature." What may be done *until* the next meeting of the legislature? May appointments be made until that time? Or may the appointee hold his office until that period, and no longer? Or do both determine on the next meeting of the legislature?

The committee think it is a limitation upon the power of the executive to make appointments in the recess of the legislature, and which cannot be exercised after its next meeting; but that the force or effect of such appointment, viz: the commission and office continue until superseded by the action of the primary appointing power, or the expiration of the senatorial term. In giving this exposition to this provision of the Constitution, the committee believe they have consulted and given effect to the spirit of that instrument, and have found the true intention and design of its framers, that the Senate should be composed of two senators from each State.

On the 6th of June, 1809, the Senate adopted the following resolution:

Resolved, That the honorable Samuel Smith, a senator appointed by the executive of Maryland to fill the vacancy which happened in the office of senator for that State, is entitled to hold his seat in the Senate of the United States during the session of the legislature of Maryland, which, by the proclamation of the governor of said State, was to commence on the 5th day of the present month of June, unless said legislature shall fill such vacancy by the appointment of a senator, and this Senate be officially informed thereof.

The Senate, in this instance, after able and full debate, has solemnly determined that the office of a senator, appointed by the executive, does not end on the next meeting of the legislature, but that it may continue during its session.

The construction that the office does not terminate on the meeting of the legislature has received the uniform approval of the Senate from that time till this; for, in all instances, (and they are numerous,) the senator appointed by the executive has not only held his office until the next meeting of the legislature, but *until* his successor was appointed and made his appearance here to qualify.

In the late cases of Mr. Winthrop and Mr. Rantoul, of Massachusetts, and of Mr. Merryweather and Mr. Dixon, of Kentucky, many able senators, to whose opinions great deference is due, expressed their convictions that it was a limitation of time, within which the appointment must be made, but that the office continued until superseded by the legislature. If, then, the office does not terminate on the *meeting* of the legislature, when will it terminate? Can *meeting* be construed into end, dissolution, or adjournment? Your committee think not.

With these adjudications of the Senate, and the exposition in debate by able senators, and in view of the propriety, if not the necessity, of having a full representation from each State in the Senate before us, and believing the language of the Constitution warrants the interpretation we have given it, your committee have come to the conclusion that the Hon. Samuel S. Phelps is entitled to retain his seat, and offer for adoption the following resolution:

Resolved, That the Hon. Samuel S Phelps is entitled to retain his seat in the Senate of the United States.

MINORITY REPORT.

The Committee on the Judiciary, to whom was referred the resolution of the Senate of the 4th instant, which reads as follows: "*Resolved*, That the Committee on the Judiciary inquire whether the Hon. Samuel S. Phelps is entitled to a seat in the Senate of the United States," have reported thereon.

As the undersigned dissent from the conclusions of a majority of their colleagues, they ask leave to submit the following report of the minority. The facts upon which the resolution was founded are as follows:

That the Hon. Samuel S. Phelps was appointed by his excellency the governor of the State of Vermont, in the recess of the legislature of that State, to fill a vacancy in the Senate of the United States, which had occurred by the death of the Hon. William Upham, a senator, whose term of six years would have continued until the 4th March, 1855; and that since the temporary appointment by the governor of said State, the legislature of Vermont has been convened at their annual session, and adjourned without filling the vacancy, as prescribed by the Constitution, which reads as follows:

"And if vacancies happen by resignation, or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointments untill the next meeting of the legislature, which shall then fill such vacancies."

The question presented to the committee by the foregoing resolution may be thus stated: What shall be the operation of an appointment of a senator made by the governor of a State in the recess of its legislature, where the legislature has met and failed to fill the vacancy by an election?

The decision of this question depends upon the construction of the above words of the Constitution. If the power to fill the vacancy is devolved *exclusively* upon the legislature at its next meeting, then it would follow that the appointing power of the executive would be exhausted; and the senator appointed by him could, according to precedent, hold his seat only during the session of the legislature; or, in other words, his commission would expire at the adjournment of the legislature.

The question may be presented in another point of view, which might *possibly* lead to a different conclusion. If the legislature has merely the potential capacity to fill the vacancy according to its discretion, then a failure to perform this function might leave the executive appointment good to fill a continuing vacancy.

This reduces the question to this proposition, viz: Do the words of the Constitution impose a limitation upon the office or the appointing power?

Before stating the conclusion of the undersigned, it may be proper to cite the precedents which are applicable to the question under consideration.

The first case upon record is as follows: George Read, a senator from the State of Delaware, resigned his seat upon the 18th day of September, 1793, and during the recess of the legislature of said State. The legislature of the said State met in January, and adjourned in February, 1794. Upon the 19th day of March, and subsequent to the adjournment of the said legislature, Kensey Johns was appointed by the governor of said State to fill the vacancy occasioned by the resignation aforesaid. The Senate decided—

That Kensey Johns was not entitled to a seat in the Senate of the United States, as a session of the legislature of the said State had intervened between the resignation of the said George Read and the appointment of the said Kensey Johns.

Mr. Eaton, from the Select Committee to whom was referred, on the 5th instant, the motion "that Mr. Lanman be admitted to take the oath required by the Constitution," together with the credentials of Mr. Lanman, submitted the following report:

That Mr. Lanman's term of service in the Senate expired on the 3d of March. On the fourth he presented to the Senate a certificate, regularly and properly authenticated, from Oliver Wolcott, governor of the State of Connecticut, setting forth that the President of the United States had desired the Senate to convene on the 4th day of March, and had caused official notice of that fact to be communicated to him.

The certificate of appointment is dated the 8th of February, 1825, subsequent to the time of notification to him by the President. The certificate further recites that, at the time of its execution, the legislature of the State was not in session, and would not be until the month of May. The Senate decided that Mr. Lanman was not entitled to a seat in the Senate of the United States.

In May, 1809, the President of the Senate laid before that body a letter from the Hon. Samuel Smith, of Maryland, stating that, being appointed by the executive of that State a senator, in conformity with the Constitution, until the next meeting of the legislature, which will take place on the 5th day of June next, he submits to the determination of the Senate the question, whether an appointment under the executive of Maryland, to represent that State in the

Senate of the United States, will, or will not, cease on the first day of the meeting of the legislature thereof.

The Senate decided that the Hon. Samuel Smith, a senator appointed to fill a vacancy, was entitled to hold his seat in the Senate of the United States during the session of the legislature of Maryland, which, by the proclamation of the governor of said State, was to convene on the 5th day of the present month of June; unless said legislature shall fill such vacancy by the appointment of a senator, and the Senate be officially informed thereof.

The chairman of the Committee on the Judiciary, at the 2d session of the 31st Congress, to whom was referred the resolution of the Senate directing said committee to inquire and report at what period the term of service of a senator appointed by the executive of a State, during the recess of the legislature thereof, rightfully expires, submitted the following report:

The question presented by the resolution turns mainly upon the construction of the clause of article 18, section 2, of the Constitution of the United States, which provides that, "if vacancies happen, by resignation or otherwise, during the recess of the legislature of any State, the executive thereof may make temporary appointment until the next meeting of the legislature, which shall fill such vacancies."

Your committee are of the opinion that the sitting member, under executive appointment, has a right to occupy his seat until the vacancy shall be filled by the legislature of the State of which he is a senator, during the next meeting thereof. To fill such vacancy, it is not only necessary to make an election, but that the person elected shall accept the appointment. And your committee are further of the opinion, that such acceptance should appear by the presentation to the Senate of the credentials of the member elect, or other official information of the fact—at which time the office of the sitting member terminates. When the member elect is present, and ready to qualify, his express acceptance is at once made known; and when his credentials are presented in his absence, his acceptance may be fairly implied.

Perhaps it would have been as well if the strict and literal meaning of the words, "*until* the next meeting of the legislature," had been observed on the first occasion in which their construction was brought in question; that would have had the merit of certainty, but a certainty that might have been too severe for the true and liberal intendment of the framers of the Constitution. They certainly did mean to say that an executive appointment should terminate when legislative jurisdiction shall commence or be exercised. To give this severe construction to the words quoted would in all cases leave a State unrepresented for a time, that depending on legislative action. Rather than lead to that result, the Senate, under the precedents quoted, seem to have regarded the "*next meeting of the legislature*" as synonymous with the next session of the legislature, during which time the member under executive appointment might hold his seat, unless it should be filled by an election before the termination of a session; and this was probably in analogy to that provision of the federal Constitution by which power is vested in the President "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session."

As there was no reference to a committee, and no reported debate in the case of Mr. Smith, of Maryland, which made the precedent, the essential reasons which govern the judgment of the Senate are not given; the case, however, seems to have been well considered. There are two considerations which seem to have entered into that judgment: first, that the State legislature, after their meeting, should have an *opportunity* of consultation, in making a choice of senator, and the State, during such term of consultation, should not be deprived of a representative in the Senate. The utmost limit contemplated for the exer-

cise of this legislative jurisdiction was the term of the sitting of the legislature. The second consideration was a confident assumption that the office would be filled during such term. The idea that a session would pass over without an election was not in the mind of the Senate. The Senate went very far when it gave an interpretation to the words referred to beyond their literal meaning, limiting the tenure of office of the sitting member to the day of the meeting of the legislature. This met with a decided opposition from a respectable minority, and in subsequent cases distinguished senators maintained the same view of the constitution. By the report of the committee, we are required to recognize as authority and to enlarge this liberality of construction. To say that the words, "until the next meeting of the legislature," may be construed to mean not only until and during the session of the next legislature, but beyond the next meeting of the legislature—in other terms, that until the next meeting, &c., may operate under the authority of precedent to give the sitting member a right to hold his seat *beyond* the meeting of the legislature. We cannot agree that by the authority of any precedent these words, "until and beyond," shall have such a meaning as will control the import of the Constitution, both in its spirit and letter.

The Senate of the United States is composed of organized constituencies, the State legislatures; to them belong the power primarily of electing their senators, when they are in session at the happening of the vacancy, and at their first meeting when it happens in their recess, and on them devolves the exclusive jurisdiction of filling such vacancies. Their right and authority to fill or supply vacancies, which have been temporarily filled by executive appointment, are as absolute and exclusive as was their power in an original election. When their power is brought into existence it must supersede all others, with this qualification, and that according to precedent, that they have a session to make the choice. In our view it does not depend on the actual exertion of the power to elect, but on its existence. A senator under an executive appointment may, or may not, represent the political views of his State; he may be the mere personal favorite of the governor. The Senate, as far as practicable, should be made to represent its constitutional constituency, and in this respect should preserve the republican feature of our Union.

In nothing that is said here would we have it inferred that we regard the sitting member, whose case is before us, as one who may not claim his seat on high grounds and respectable authority. The sanction of a majority of the committee, the opinions of eminent jurists, out of this body, go far to sustain his claim. But from the views of the undersigned, above presented, we do not think the Hon. Samuel S. Phelps is entitled to hold his seat in this body.

A. P. BUTLER.
J. A. BAYARD.

The vote upon the resolution reported by the committee was—yeas 12; nays 26. So it was rejected.

NOTE.—The debate will be found on pages 176, 250, 303, 630, 689, and 646 of the Congressional Globe, 33d Congress, 1st session.

THIRTY-FOURTH CONGRESS, FIRST SESSION.

Mr. TRUMBULL, *of Illinois.*

The State cannot add to the qualifications of a United States senator prescribed in the Constitution of the United States. Whoever possesses those qualifications is eligible.

IN THE SENATE.

FEBRUARY 27, 1856.

Mr. BUTLER, from the Committee on the Judiciary, made the following report:

That it has been under consideration and discussion by the committee, and there being such a division of opinion as to render it proper, in their judgment, to refer the subject to the Senate, they ask to be discharged from the further consideration thereof.

Certified copy of the resignation of Lyman Trumbull of the office of justice of the supreme cour of the State of Illinois.

ALTON, *May* 19, 1853.

SIR: I am induced, by considerations of a personal and private character, to resign the office of justice of the supreme court; but to allow time for the election of a person to succeed me, so that no public inconvenience may result from a vacancy on the bench, I hereby tender my resignation of said office, to take effect on the fourth day of July next.

Yours, very respectfully,

LYMAN TRUMBULL.

His Excellency JOEL A. MATTESON,
Governor of Illinois.

UNITED STATES OF AMERICA, *State of Illinois, ss:*

I, Alexander Starne, secretary of state of the State of Illinois, do hereby certify that the foregoing is a true and correct copy of Lyman Trumbull's resignation, filed in the secretary's office May 20, 1853.

And I further certify that Walter B. Scates was elected to fill said vacancy, and entered upon the discharge of the duties of said office July 13, 1853.

In testimony whereof, I have hereunto set my hand and affixed the seal of State this ninth day of November, A. D. 1855.

[L. S.]

ALEXANDER STARNE,
Secretary of State.

Certificate of Joel A. Matteson, governor of the State of Illinois, relative to the election of Lyman Trumbull to be a senator of the United States, and also to the office of justice of the supreme court of that State.

EXECUTIVE DEPARTMENT,
State of Illinois, November 1, 1855.

I, Joel A. Matteson, governor of the State of Illinois, do hereby certify that it appears of record that on the eighth day of February, A. D. 1855, the two houses of the legislature of the State of Illinois met in convention and proceeded to vote for the election of a senator for said State to the Senate of the United States; that upon the final vote Lyman Trumbull received fifty-one votes, Joel A. Matteson received forty-seven votes, and Archibald Williams received one vote; and the Speaker of the House of Representatives thereupon declared Lyman Trumbull elected a senator of the United States for the State of Illinois, for six years from the fourth day of March, A. D. 1855.

That it further appears from record that the said Lyman Trumbull was elected on the seventh day of June, A. D. 1852, a justice of the supreme court of the State of Illinois for a term of nine years; that on the 24th day of June, A. D. 1852, he was duly commissioned as justice for the term aforesaid, commencing on the first Monday of June, A. D. 1852, and ending on the first Monday of June, A. D. 1861; that he was sworn and entered upon the discharge of his duties appertaining to said office; that the constitution of the State of Illinois contains the following provision, to wit:

"The judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit in this State or the United States during the term for which they are elected, nor for one year thereafter; all votes for either of them, for any elective office, except that of judge of the supreme or circuit court, given by the general assembly or people, shall be void."

All of which, together with the legality of said election, are respectfully submitted to the Senate of the United States.

J. A. MATTESON. [L. S.]

By the governor:

ALEXANDER STARNE,
Secretary of State.

To the PRESIDENT OF THE SENATE *of the United States.*

UNITED STATES OF AMERICA, *State of Illinois, ss:*

I, Alexander Starne, secretary of state for the State of Illinois, do hereby certify that Lyman Trumbull was on the seventh day of June, A. D. 1852, elected judge of the supreme court of the State of Illinois, and was duly commissioned as such for the term of nine years, from the 24th day of June, 1852: that he took upon himself the oath of office, and entered upon the discharge of the duties of the same; that said term of office for which he was elected is unexpired, and will not expire until the 27th day of June, 1861.

In testimony whereof, I have hereunto set my hand and affixed the seal of said State this 24th day of February, A. D. 1855.

[L. S.] ALEXANDER STARNE,
Secretary of State.

Protest of certain senators and representatives of the legislature of the State of Illinois against the election of the Hon. Lyman Trumbull as a senator of the United States.

To the honorable the Senate of the United States:

The undersigned, senators and representatives of the people of the State of Illinois, in the legislature thereof, respectfully represent: That at a meeting of both houses of said legislature, in general assembly convened, on the 8th day of February, 1855, for the purpose of electing a senator for said State to the Senate of the United States, for six years from the 4th of March, 1855, fifty-one votes were cast for Lyman Trumbull, forty-seven votes for Joel A. Matteson, and one vote for Archibald Williams, and that one member of said legislature was absent.

They further represent that the constitution of the State of Illinois contains the following provision in the tenth section of the fourth article thereof:

"The judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit in this State or the United States during the term for which they are elected, nor for one year thereafter; all votes for either of them, for any elective office, except that of judge of the supreme or circuit courts, given by the general assembly or the people, shall be void."

They further represent that said Lyman Trumbull was, on the 7th day of June, 1852, elected judge of the supreme court of the State of Illinois, and was duly commissioned as such, for the term of nine years from the 24th day of June, 1852; that he took upon himself the oath of said office, and entered upon the discharge of the duties of the same; that his said term of office for which he was elected is unexpired, and will not expire until the 27th day of June, 1861; and that in and by virtue of the said provision of the constitution of the said State of Illinois, the votes cast by the members of the general assembly for said Trumbull, for senator of said State, as aforesaid, are null and void, and said Trumbull is not legally elected to the Senate of the United States, and is not entitled to his seat in said Senate; and against said pretended election the undersigned, in behalf of themselves and their constituents, do hereby protest.

Senators.—Hugh L. Sutphin, Joseph Morton, James M. Campbell, J. C. Davis, W. H. Carlin, A. J. Kuykendall, M. O. Kean, Ben. Graham, John E. Detrich, Silas L. Bryan, James L. D. Morrison, G. R. Jennigan, and A. P. Corder.

Representatives.—F. D. Preston, C. L. Higbee, Tho. P. Richmond, George Walker, T. B. Sauner, Dr. H. A. Browne, S. D. Masters, Saml. H. Martin, William J. Allen, B. P. Hinch, Eli Seehorn, James Bradford, Jonathan Dearborn, D. McClain, Frank M. Rawlings, G. M. Gray, Jona. McDaniel, Wm. R. Morrison, P. E. Hosmer, L. F. McCrillis, George H. Holliday, J. R. Bennett, S. W. Moulton, W. N. Cline, Presley Funkhouser, James M. Pursley, Hugh Gregg, C. C. Hopkins, and Henry Richmond.

Credentials of the Hon. Lyman Trumbull, elected a senator by the legislature of the State of Illinois.

It is hereby certified that, in pursuance of a joint resolution to that effect adopted, the two houses of the general assembly of the State of Illinois, now in session at Springfield, in said State, did convene in joint session in the hall of the house of representatives on the eighth day of February, in the year of our Lord one thousand eight hundred and fifty-five, for the purpose of electing a senator to the Congress of the United States for the term of six years from the fourth day of March in the year aforesaid, and that Lyman Trumbull was then and there, by said joint session of the legislature of said State, duly elected senator to represent the State of Illinois in the Senate of the United States for six years from the said fourth day of March next.

Dated at Springfield the ninth day of February, one thousand eight hundred and fifty-five.

Attest:

GEORGE T. BROWN,
Secretary of the Senate.
EDWIN T. BRIDGES,
Clerk of the House of Representatives.
THOMAS S. TURNER,
Speaker of House of Representatives and presiding officer of said joint session.

UNITED STATES OF AMERICA, *State of Illinois, ss:*

I, Alexander Starne, secretary of state for the State of Illinois, do hereby certify that the foregoing is a true and correct copy of a certificate of the election of Lyman Trumbull to the United States Senate, as filed in my office by the clerk of the house of representatives.

In testimony whereof, I have hereunto set my hand and affixed the seal of said State this 15th day of February, A. D. 1855.

[L. S.] ALEXANDER STARNE,
Secretary of State.

Mr. CRITTENDEN submitted the following statement of facts in his argument before the Senate:

The facts in the case are few and undisputed. Mr. Trumbull was, in point of fact, chosen by the legislature of Illinois as a senator in this body. It is true that some four years before that time he had been elected a judge of one of the circuit courts of that State, but it is also true that he had resigned that office about eighteen months before his election as a senator. The first question, therefore, that presents itself is, whether upon these facts, and a proper construction of the constitution of the State of Illinois, he is entitled to his seat? No objection is made to any qualification required by the Constitution of the United States. The question is, whether there is anything in the constitution of Illinois which can invalidate his election. I will first consider the question as it arises upon the constitution of Illinois, and then as respects the Constitution of the United States. The provision of the constitution of Illinois I desire to read to the Senate. The tenth section of the fifth article of the constitution of that State reads in these words:

"The judges of the supreme court shall receive a salary of $1,200 per annum, payable quarterly, and no more. The judges of the circuit courts shall receive a salary of $1,000 per annum, payable quarterly, and no more. The judges of the supreme and circuit courts shall not be eligible to any other office of public trust or profit in this State, or the United States, during the term for which they are elected, nor for one year thereafter. All votes for either of them for any elective office, (except that of judge of the supreme or circuit court,) given by the general assembly, or the people, shall be void."

Mr. Trumbull was elected on the 7th of June, 1852, judge of the circuit court for the term of nine years. Having held that office less that one year, he resigned on the 19th of May, 1853, to take effect on the ensuing 4th of July. He was elected to the Senate of the United States on the 8th of February, 1855, more than eighteen months after his resignation, but before the expiration of the nine years for which he had been originally elected a judge.

To these facts we are to apply the constitutional provision which I have read, which declares that no judge of the supreme court or circuit court should be eligible to any other office for the term for which he was elected, and for one year thereafter. Does this prohibition in the constitution of Illinois apply to such a case as this? I say that it does not. In order to ascertain the meaning of any instrument, we must endeavor to ascertain the intention of its framers. What was the intention of the framers of this provision? It was to preserve the independence of their judiciary, and to prevent the possibility of one of the judges of the State using the influence of that office to obtain another. That is the reason and the sole reason for this prohibition; and to accomplish this object the constitution of Illinois provides not only for ineligibility during the term of nine years, but for one year thereafter, lest he should, by anticipated contrivances, intrigues, and influence, provide for another office by the use of the influence which his present office affords. One year after the expiration of his office was supposed to be sufficient for that purpose.

The argument in favor of Mr. Trumbull's right to the seat proceeded upon the ground that the people of Illinois could not add to the qualifications of a senator as prescribed in the Constitution of the United States.

Mr. Trumbull was declared entitled to the seat—yeas 35, nays 8.

NOTE.—The debate in this case occurs in vol. 32, part 1, pages 1, 58, 343, 466, 514, 515, 547, 549, 552, 579, 584.

THIRTY-FOURTH CONGRESS, THIRD SESSION.

Mr. HARLAN, *of Iowa.*

The simple facts were reported in this case. There was no memorial. The debate in the Senate shows that the majority held that the *legislature* of Iowa did not elect Mr. Harlan senator, the senate not meeting as such in joint convention with the house of representatives.

IN THE SENATE,

JANUARY 5, 1857.

Mr. BUTLER, from the Committee on the Judiciary, made the following report:

The following proceedings were had in the legislature of the State of Iowa in the election of a United States senator:

SATURDAY, *December* 9, 1854.

Resolved, (the senate concurring,) That the house of representatives will meet the senate in the hall of the house on Tuesday next, at 2 o'clock p. m., for the purpose of electing a senator of the United States and judges of the supreme court.

On motion,

The resolution was laid on the table.

DECEMBER 12, 1854.

Resolution fixing the time for the election of a United States senator was taken up and amended so as to fix Friday, the 15th instant, as the day for an election.

Message from the senate, by Mr. Rankin, their secretary:

Mr. Speaker: I am instructed by the senate to inform the house that the senate has concurred in the house resolution to go into joint ballot on Friday, the 15th instant, for the purpose of electing a United States senator and supreme judges, with the following amendment, viz: to strike out the words Friday, the 15th instant, at 2 o'clock, and insert this: Wednesday evening, at 2½ o'clock.

Agreed to.

Joint convention of the two houses.

The president of the senate acting as president of the convention, and the clerk of the house acting as secretary.

On motion, the convention proceeded to the election of a United States senator for six years from and after the 4th day of March next.

The president appointed Mr. Workman teller on the part of the senate. The speaker appointed Mr. Kinert teller on the part of the house.

The convention proceeded to a vote, which resulted in no choice.

The convention proceeded to a second ballot, which resulted in no choice.

The convention adjourned until to-morrow at 10 o'clock.

DECEMBER 14, 1854.

By order of the president the roll of the convention was called.

Same tellers as yesterday.

Motion to adjourn until Thursday next at 10 o'clock.

Motion prevailed.

The president announced the convention adjourned until 10 o'clock a. m. Thursday, December 21.

THURSDAY, *December* 21, 1854.

Joint convention of the two houses; the president of the senate acting as president of the convention, and the clerk of the house acting as secretary.

Same tellers acting.

The president having announced the purposes of the convention, and directed the roll to be called—

The convention proceeded to vote for a United States senator for the term of six years from and after the 4th day of March next.

After several ballots, without making a choice, the convention adjourned until the 5th day of January, 1855.

FRIDAY, *January* 5, 1855.

Convention met.

The president announced the purposes of the convention.

After several additional ballots, on motion, the convention adjourned until to-morrow

SATURDAY, *January* 6, 1855.

It being the hour of 10 o'clock a. m., the speaker of the house announced the same, and the special order to be a joint convention of the senate and house of representatives, pursuant to adjournment, for the purposes of electing a United States senator and judge of the supreme court.

A committee of three was appointed to wait upon the senate and inform that body that the house of representatives was now ready to receive the senate in joint convention, &c.

The committee appointed to wait on the senate reported that they had discharged that duty by proceeding to the senate chamber and delivering their message, and informing the secretary of the senate thereof. That the secretary informed the committee that the senate had adjourned over to Monday next.

A number of the members of the senate entered the hall of the house without their president and took their seats.

The speaker announced that the joint convention of the senate and house of representatives was now in session, pursuant to adjournment, for the purposes of electing a judge of the supreme court and a United States senator.

Mr. Samuels rose to a question of order, to wit: Was the joint convention properly convened? The speaker announced that the convention had now convened.

Mr. Samuels appealed from the decision of the speaker, and asked for the yeas and nays, and insisted on his appeal being decided only by the house of representatives.

The roll of the joint convention was called, and the following members of the convention answered to their names, being a majority of both branches of the general assembly.

[Here follow the names of 57 members.]

Those members of the convention and members of the house of representatives, except Mr. Franklin excused, who did not answer to their names, refused to answer, or retired from the hall during the call of the roll.

The speaker announced that a majority of the members of the general assembly being present, that there was a quorum of the joint convention now convened, pursuant to adjournment, and that the appeal of Mr. Samuels could not be taken to the members of the house of representatives only.

On motion of Senator Anderson, William W. Hamilton, a senator from Dubuque county, was elected president *pro tem.* of the convention.

The president of the senate still being absent,

The speaker of the house of representatives in his chair, and the clerk of the house of representatives acting as secretary of the joint convention.

The roll of the convention was called, and the following members of the convention did not answer to their names, to wit:

[Here follow the names of forty-four members.]

On motion of Mr. Russell,

The sergeant-at-arms was directed to notify members of the convention who had not answered to their names that the convention was now convened, and to request their attendance.

Senators Ramsey and Thurston appeared on the floor of the convention, and desired to be considered as not acting in the convention.

The sergeant-at-arms reported that he had performed his duty, as required by the convention; that a few of the members he could not find.

On motion of Mr. Conkey,

Further proceedings under the call were dispensed with.

Mr. Workman, teller on the part of the senate, being absent,

Mr. Needham was appointed in his stead.

Mr. Kinert acting as teller on the part of the house.

The convention proceeded to the election of a second associate judge of the supreme court; after which the convention proceeded to the election of a United States senator for the State of Iowa, for the term of six years, from and after the 4th of March next. * * *

Mr. Anderson nominated James Harlan, of Henry county.

The convention proceeded to vote for a United States senator, being the ninth vote, which resulted as follows:

Those voting for James Harlan were—

[Here follow the names of fifty-two members.]

Messrs. Clark, of Marion, and Neely voted for Bernhart Henn; Mr. McAchran voted for Wm. McKay; Mr. Witter voted for James Grant. James Harlan having received a majority of all the votes cast, and a majority of the whole number of the members of the general assembly, was declared duly elected a senator of the United States, for the State of Iowa, for the term of six years from and after the 4th day of March next.

The certificate of election was made out and duly attested in the presence of the convention, &c. * * * * * * * * *

HALL OF THE HOUSE OF REPRESENTATIVES,
January 6, 1855.

This will certify that, at an election by the general assembly of the State of Iowa, in joint convention, on Saturday, the 6th day of January, A. D. 1855, James Harlan was duly elected a senator to represent this State in the Senate of the United States for the term of six years from and after the 4th day of March next.

WILLIAM W. HAMILTON,
President pro tem.
REUBEN NOBLE,
Speaker of the House of Representatives.

Attest:
JOHN R. NEEDHAM, } *Tellers.*
DAVID KINERT, }

On motion of Mr. Hills, the joint convention adjourned *sine die*, and the members of the senate retired.

[*Journal of the house of representatives of the State of Iowa.*

MONDAY MORNING, *January* 8, 1855.

Mr. Coolbaugh offered the following:

Whereas it is reported that the journal of the house of representatives, as read this morning in the presence of the house, alleges that a joint convention of the general assembly of this State was held in the hall of the house on Saturday, the 6th instant; and whereas it is alleged in said journal that said joint convention proceeded to elect one Norman W. Isbell as an associate judge of the supreme court of this State, and one James Harlan as a senator of the United States, for the term of six years from the 4th day of March next: therefore,

Resolved, That inasmuch as the senate has no knowledge of any such joint convention, and did not participate in the proceedings, therefore it hereby protests against the action of the so-called joint convention, and declares the same to be void and of no effect.

Resolved, That a copy of this preamble and resolution be signed by the president and certified to by the secretary of the senate, be presented to the governor of this State, and also a copy forwarded to the presiding officer of the Senate of the United States, with a request to lay the same before that body. Upon the adoption of which, the yeas and nays being demanded were ordered, and were as follows: yeas 17; nays 14. The preamble and resolutions were adopted.—*Journal of the senate of the State of Iowa*, 1854–'55.

AN ACT to provide for the election of United States senators and other officers.

SECTION 1. *Be it enacted by the general assembly of the State of Iowa*, That at each and every regular session of the general assembly of this State, next preceding the expiration of the constitutional term of service of a United States senator, or at any session when a vacancy shall exist, at an hour to be designated by a resolution of either branch, with the concurrence of the other branch of the general assembly, the members of both houses thereof shall meet in convention in the hall of the house of representatives, for the purpose of electing a senator or senators by joint vote, in pursuance of the Constitution of the United States, to represent this State in the Senate of the United States.

SEC. 2. The president of the senate, or, in his absence, the speaker of the house of representatives, shall preside over the deliberations of the convention; and in the absence of both, a president *pro tempore* shall be appointed by joint vote.

SEC. 3. At any time prior to meeting in convention as aforesaid, after the time for meeting has been designated as aforesaid, each branch of the general assembly shall appoint one teller, and the two tellers thus appointed shall act as judges of the election.

SEC. 4. The secretary of the senate and the chief clerk of the house of representatives shall each keep a fair and correct record of the proceedings of the convention, which shall be entered upon the journals of each branch of the general assembly. The chief clerk of the house of representatives shall act as secretary to the convention.

SEC. 5. The names of the members of the general assembly shall be arranged by the secretary in alphabetical order, and each member shall vote in the order in which his name stands when thus arranged.

SEC. 6. When the convention shall be organized as aforesaid, the members present shall proceed to choose *viva voce* a senator or senators, as the case may be, to represent this State in the Senate of the United States. The name of the person voted for, and of the members voting, shall be entered in writing by the tellers, who shall, after the secretary shall have called the names of the members a second time, and the name of the person for which each member has voted, report to the president of the convention the number of votes given for each candidate.

SEC. 7. If neither of the candidates shall receive the votes of a majority of the members present, a second poll may be taken; and so from time to time, until some one of the candidates shall receive a majority of the votes of the members present.

SEC. 8. If the election shall not be completed at the first meeting, the president shall adjourn the convention whenever and to such time as a majority of the members then present shall determine; and so from time to time, until some one of the candidates shall receive a majority as aforesaid.

SEC. 9. When any person shall have received a majority of the votes aforesaid, the president of the convention shall declare him to be duly elected a senator to represent this State in the Senate of the United States; and he shall, in the presence of the members of both houses, sign two certificates of election, attested by the tellers—one of which he shall transmit to the governor, and the remaining one shall be preserved among the records of the convention, and entered at length on the journals of each house of the general assembly.

SEC. 10. Upon the reception of said certificate, the governor shall cause a credential to be made out, with the great seal of the State affixed thereto, and cause it to be delivered to such senator elect, which credential shall be in form following:

[Here follows the form of the credential.]

Laws of Iowa, 1847, *pages* 92 *and* 93.

The Constitution of the United States contains the following provision in reference to the election of United States senators:

SEC. 4. The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing senators.

And the clause under which the committee are acting, as to the qualification of the gentleman, is as follows:

SEC. 5. Each house shall be the judge of the elections, returns, and qualifications of its own members. o o o o o o o o o

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STATE OF IOWA, *to wit:*

The general assembly of this State, on the sixth day of January, one thousand eight hundred and fifty-five, having, in pursuance of the Constitution of the United States of America, chosen James Harlan a senator to represent this State in the Senate of the United States, I, James W. Grimes, governor of the State of Iowa, do by these presents certify the same to the Senate of the United States.

Given under my hand and the great seal of the State of Iowa this twentieth day of January, 1855.

[L. S.] JAMES W. GRIMES.

By the governor:

GEO. W. MCCLEARY,
Secretary of State.

The foregoing statement of facts and recital of clauses of laws and the constitution present all the questions involved in the controversy growing out of the contested election under consideration. From the view which a majority of the committee have taken of these questions, they have come to the conclusion that the sitting member (Mr. Harlan) has not been duly elected a senator of the United States by the *legislature* of Iowa.

Resolved, That the seat of the aforesaid gentleman be declared vacant.

Mr. BAYARD, of the Judiciary Committee, made the subjoined statement of the facts of the case:

The substantial facts of the case I understand to be these: A resolution was passed in the house of representatives of Iowa on the 13th of December, 1854, proposing to the senate of Iowa to meet in joint convention on the 15th of December for the purpose of electing a senator of the United States. The resolution was amended by the senate by fixing two o'clock, or two and a half o'clock, of the same day for the joint meeting. The house concurred in the amendment, and the bodies went into joint convention on that day, a quorum of each house being present when they met. They proceeded to ballot, and having balloted ineffectually, they adjourned at various times—on one occasion, I think, from the 14th of December, 1854, to the 5th of January, 1855. On the 5th of January they met, and still

failed to elect a senator. They adjourned to ten o'clock on Saturday morning, the 6th of January. The senate, (as throughout the whole of these proceedings it appears each house did,) after they separated, returned to their own chamber, and adjourned to the same hour on the next day. When the senate met at ten o'clock on the 6th of January, they, without doing any business whatever, adjourned to Monday at nine o'clock. This adjournment was carried by a vote of the majority, on the yeas and nays—16 to 15—the whole body, consisting of thirty-one members, being present. The senate of Iowa was, therefore, not in session on Saturday after ten o'clock.

The house of representatives met, at what hour I do not know; but after transacting appropriate business as a house of representatives, they proceeded to receive, not the senate of Iowa, which was not in session, but to receive members of the senate of Iowa as members of the joint convention; and when those members were assembled there, together with the members of the house, they constituted a majority of the two branches combined; that is, a majority of the whole number of persons in the convention. But there was present—I speak now of persons present in the sense of legal presence, as evidenced by the vote—only a majority of the house and a minority of the senate—a quorum of one body and not a quorum of the other. The speaker of the house assumed that the members thus assembled were a regularly organized convention of the legislature, with the power to elect a United States senator. No vote was taken by the convention on that point. An appeal was taken from the decision, and it was contended that the house ought to decide whether it was organized. That appeal the speaker denied, and there was no vote taken by the convention on that question at all. The roll was called, and as a majority of the members of both branches (not a majority of each branch) answered to their names, the speaker declared that the joint convention was regularly organized according to its adjournment, and they proceeded to vote for a United States senator. After electing first a teller in lieu of the senate teller, who was absent, and also a president *pro tempore* of the convention, the members proceeded to vote *viva voce* for a senator of the United States. A majority of the members of the house of representatives voted, but only fifteen senators voted on that occasion.

These are the real facts of the case, as they appear from the journals and papers. On the vote to which I have just alluded being taken, it was declared that the honorable gentleman who now holds the seat was regularly elected to the Senate of the United States, and he came here and was admitted. The senate of Iowa met on the Monday morning next after the adjournment of Saturday, and after this alleged election had taken place, and their first act was to protest against it, as done without their authority as a co-ordinate branch of the legislature of Iowa.

It will be observed, also, from the facts of this case, that the journals show that on al occasions when the two houses met they met as houses; a message was sent from one house to the other. The record shows that the senate, preceded by its president, came to the hall of the house of representatives, and the members of the senate had seats assigned them as a co-ordinate branch of the legislature; and after that was done, at all previous meetings they proceeded to vote. On this occasion there was no senate in session; but the record shows that several members of the senate, without saying how many, were present. The fact is conceded, I understand, that there were but fifteen members of the senate who voted on that occasion, the whole senate consisting of thirty-one; and hence, less than a quorum of the senate participated in the election.

Mr. BAYARD stated the law of the case as follows:

On this state of facts the question which I suppose to arise is, whether "the legislature" of a State, under the language of the federal Constitution delegating to the legislature the right to elect senators of the United States, is to be taken to mean the individual members of the legislature, or the body or bodies of which the legislature is composed. I suppose the term, as used in the Constitution, means the bodies of which the legislature is composed. The honorable senator from Georgia, if I appreciate his argument, insists that the power being delegated to the legislature, is vested in the members of the legislature, and that whenever a majority of the members of the whole legislature under a law, such as that existing in Iowa, vote for a man, he is elected, though one of the co-ordinate branches of that legislature may not vote for him, and may, as a body, refuse to go into an election. Sir, I hold it to be a principle of law, which has, I think, no exception, that where two integral bodies are authorized to do an act, it cannot be done without the consent of those two integral bodies. They must both be present and act in the matter, or there can be no validity in the act done. This is a universal law. I can call to mind no case where a contrary principle prevails, whether relating to legislative action or corporate action. Indeed, in reference to corporations, it has been decided over and over again, that where there are two integral bodies who must concur in an act, they must both be present and act upon the matter as bodies, not as individuals.

The Senate declared Mr. Harlan not entitled to the seat—yeas 28, nays 18.

NOTE.—The debate in this case will be found as follows: on pages 112, 221, 248, 260, 287, 299, Congressional Globe, 34th Congress, 3d session.

THIRTY-FOURTH CONGRESS, THIRD SESSION.

Mr. CAMERON, *of Pennsylvania.*

Where there were vague allegations of corruption in the State legislature, it was held by the committee that it was not the duty of the Senate to take cognizance of the charges.

IN THE SENATE,

MARCH 11, 1857.

Mr. BENJAMIN. I am instructed by the Committee on the Judiciary, to whom was referred the protest of certain members of the senate and house of representatives of the State of Pennsylvania, alleging certain irregularities and illegalities in the election of the Hon. Simon Cameron, a senator from said State, to make the following report:

The grounds of protest are stated as follows:

1. That there was not a concurrent majority of each house in favor of the candidate declared to be elected.

2. That the Senate did not comply with the requirements of the act of 2d July, 1839, by appointing a teller and making a nomination of persons to fill said office, and giving notice of said appointment and nomination at least one day previous to the meeting of said convention.

In addition to the two grounds aforesaid, the protest presented by the members of the house of representatives charges—

3. "That the election of the said Simon Cameron was procured, as they are informed and believe, by corrupt and unlawful means, influencing the action and votes of certain members of the house of representatives of this State; and they request that an investigation be ordered by your honorable body, not only into the regularity of the said election, but into the charges herein presented, in order that an opportunity may be afforded of submitting the proof upon which they rest."

In relation to the first two grounds of protest, the committee are unanimously of opinion that no facts are presented tending in the slightest degree to impair the validity of the election of Mr. Cameron.

It is true that the law of Pennsylvania on the subject of the election of senators requires that each branch of the legislature shall appoint one teller, and nominate at least one person to fill such office, and communicate to the other house the names of the persons so appointed and nominated at least one day previous to the joint meeting; but the same law also provides, that at the hour of twelve, on the second Tuesday in January next preceding the expiration of the constitutional term of a senator, the members of both houses shall meet in convention in the chamber of the house of representatives, and choose a senator *viva voce* from the persons so nominated as aforesaid; and also expressly provides that the person who shall receive the votes of a majority of the members present shall be declared duly elected.

From the extracts furnished by the protesting parties, taken from the journals of the two houses, it appears that the two houses did meet in joint convention on the day and at the place appointed by law, and in accordance with resolutions passed in each house separately, and that one hundred and thirty-three members, composing the entire legislature of Pennsylvania, were present and voted, and that Simon Cameron received sixty-seven votes, and sixty-six votes were given for all the other candidates; and that Simon Cameron having thus obtained a majority of the votes of all the members present, was declared duly elected senator.

It appears from the journal of the Senate that the appointment of a teller and the nomination of candidates, and the communication to the other house of the appointment and nomination so made, all took place on the day of the election, instead of one day previous to the election, as required by the law of the State; but your committee regard this provision of law as purely directory in its nature, and are of opinion that a failure to comply with this formality would under no circumstances suffice to vitiate an election otherwise legal and valid; but where, as in the present case, both houses proceeded without objection from any source to perform their constitutional duty of electing a senator, the necessity of complying with any particular forms required by law may fairly be considered as waived by common consent, and it is entirely too late, after the result of the voting has been ascertained, to raise a question as to the mode of proceeding.

The objection that there was not a concurrent majority of each house in favor of the candidate declared to be elected is equally untenable under the statute of Pennsylvania, and the uniform practical construction of the federal Constitution for the last half century.

The third ground of protest is signed by members of the house of representatives of Pennsylvania, but not by the members of the senate of that State.

It is a general allegation "that the election of the said Simon Cameron was procured, as they are informed and believe, by corrupt and unlawful means, influencing the action and votes of certain members of the house of representatives," and the Senate of the United States is asked to investigate the charge.

The committee cannot recommend that this prayer be granted. The allegation is entirely too vague and indefinite to justify such a recommendation. Not a single fact or circumstance is detailed as a basis for the general charge. Neither the nature of the means alleged to be corrupt and unlawful, nor the time, place, or manner of using them, is set forth, nor is it even alleged that the sitting member participated in the use of such corrupt means, or, indeed, had any knowledge of their existence. Under no state of facts could your committee deem it consistent with propriety, or with the dignity of this body, to send out a roving commission in search of proofs of fraud in order to deprive one of its members of a seat to which he is, *prima facie*, entitled; still less can they recommend such a course when the parties alleging the fraud and corruption are themselves armed with ample powers for investigation. If it be, indeed, true that members of the house of representatives of Pennsylvania have been influenced by corrupt considerations or unlawful appliances, the means of investigation and redress are in the power of the very parties who seek the aid of the Senate of the United States. Let their complaint be made to the house of which they are members, and which is the tribunal peculiarly appropriate for conducting the desired investigation. That their complaint will meet the respectful consideration of that house your committee are not permitted to doubt. If upon such investigation the facts charged are proven, and if they, in any manner, involve the character of the recently-elected member of this body from the State of Pennsylvania, the Constitution of the United States has not left the Senate without ample means for protecting itself against the presence of unworthy members in its midst. In the mean time your committee see no reason for initiating any proceeding on the subject, and submit the following resolution:

Resolved, That the Committee on the Judiciary be discharged from the further consideration of the subject.

The resolution was adopted without a division.

NOTE.—This case will be found in the Congressional Globe, 34th Congress, third session, pages 387-391.

THIRTY-FOURTH AND THIRTY-FIFTH CONGRESS.

Messrs. BRIGHT and FITCH, *of Indiana.*

It was claimed in this case by the memorialists who contested the election of Messrs. Bright and Fitch, that the State senate was not present as an organized body in the joint convention which elected those gentlemen. The Senate confirmed their title to the seats.

IN THE SENATE,

JANUARY 21, 1858.

Mr. BAYARD, of the Judiciary Committee, submitted a report which gives the preliminary history of this case in the Senate. It is as follows:

The committee find that the protests against the election of the Hon. Graham N. Fitch as a senator in Congress from the State of Indiana were referred to the Committee on the Judiciary on the 10th of February, 1857, and on the 26th of the same month a resolution was reported by the committee authorizing testimony to be taken both by the protestants and the sitting member. The resolution not being acted upon by the Senate at that session, from the pressure of other business, the protests were again referred to the committee on the 9th of March last, at the special session of the Senate, and the same resolution, with a slight amendment, reported by the committee on the 13th of the same month, which being taken up on the day it was reported, a debate ensued upon an amendment offered by the Hon. Mr. Trumbull, of Illinois, and the Senate having on the previous day resolved to adjourn "*sine die*" on the 14th of March, at 1 o'clock, the resolution reported by the committee was ordered to lie on the table.

The protests against the election of the Hon. Jesse D. Bright, as well as against the election of the Hon. Graham N. Fitch, having been referred at the present session, and the objections of the protestants and allegations of the sitting members being identical in both cases, the committee have adopted and recommend the passage of the resolution reported to the Senate by the committee at the special session on the 13th day of March last, with such variation as is requisite to make it apply to the cases of both the sitting members, as follows:

Resolved, That in the case of the contested election of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright, senators returned and admitted to their seats from the State of Indiana, the sitting members, and all persons protesting against their election, or any of them, by themselves, or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members touching all matters of fact herein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis.

The Senate adopted the resolution.

On the 24th of May Mr. Pugh reported the entire testimony taken, and submitted from the Judiciary Committee the following resolution:

Resolved, That Graham N. Fitch and Jesse D. Bright, senators returned and admitted from the State of Indiana, are entitled to the seats which they now hold in the Senate as such senators aforesaid—the former until the 4th of March, 1861, and the latter until the 4th of March, 1863, according to the tenor of their respective credentials.

The undisputed facts in the case are thus stated by a minority of the Judiciary Committee:

The legislature of Indiana, called the general assembly, is composed of a senate of fifty members, and a house of representatives of one hundred members, and

two-thirds of each house is, by the constitution, required to constitute a quorum thereof. Each house is declared to be judge of the election and qualification of its members, and required to keep a journal of its proceedings. No regulation exists by law in Indiana as to the manner in which members of the State senate are to be inducted into office. No law or regulation is there existing providing the time, place, or manner of electing United States senators.

It appears by the journal of the senate of Indiana that on the opening of the senate at the meeting of the legislature, January 8, 1857, forty-nine of the senators were present, and that all the newly elected members were duly sworn, took their seats, and continued thereafter to act with the other senators till the close of the session. The only absentee senator took his seat January 13. 1857. Protests were filed contesting the seats of three of the newly elected members, which were afterwards examined and considered by the senate, and they were each found and declared to be entitled to seats, respectively, by majorities more or less numerous, all which is entered upon and appears by the journal of said senate.

The State constitution makes it the duty of the speaker of the house of representatives to open and publish the votes for governor and lieutenant governor in the presence of both houses of the general assembly. No provision exists by the constitution making such meeting or presence of the two houses a convention, or providing any officers therefor, or authorizing or empowering the same to transact any business whatever, except by joint vote forthwith to proceed to elect a governor or lieutenant governor in case of a tie vote.

Both houses being in session, the speaker notified them that he should proceed to open and publish the votes for governor and lieutenant governor on Monday, the 12th day of January, at 2½ o'clock p. m., in the hall of the house. Shortly before the hour arrived the president of the senate announced that he would proceed immediately to the hall of the house of representatives; and thereupon, together with such senators as chose to go, being a minority of the whole number thereof, he repaired to the hall of the house of representatives. and there, in their presence, and in the presence of the members of the house. the votes for governor and lieutenant governor were duly counted and published by the speaker, and A. P. Willard, the then president of the senate, was declared duly elected governor, and A. A. Hammon lieutenant governor, of said State.

At the close of this business, a senator present, without any vote for that purpose, declared the meeting (by him then called a convention) adjourned to the 2d day of February, 1857, at two o'clock.

The senate hearing of this proceeding, on the 29th day of January, 1857, as appears by its journal, passed a resolution protesting against the proceedings of said so-called convention, disclaiming all connexion therewith or cognizance thereof, and protesting against any election of United States senators or any other officer thereby. On the 2d of February, 1857, the president of the senate, with a minority of its members, again attended in the hall of the house, and without proceeding to any business, and without any vote, declared the meeting (by him called a convention) adjourned until the 4th day of February, 1857, at which time the president of the senate, with twenty-four of its members, went to the hall of the house of representatives, and there they, together with sixty-two members of the house, proceeded to elect two senators of the United States, to wit: Graham N. Fitch and Jesse D. Bright, they each receiving eighty-three votes, and no more, at their respective elections, twenty-three of which votes were by members of the senate.

Against these elections so made, protests by twenty-seven members of the senate of Indiana and thirty-five members of the house of representatives of said State have been duly presented, alleging that, in the absence of any law, joint resolution, or regulation of any kind by the two houses composing the

legislature of Indiana providing for holding a joint convention, it is not competent for a minority of the members of the senate, and a majority but less than a quorum of the members of the house of representatives of said State, to assemble together and make an election of United States senators.

Of the facts as herein stated there is no dispute, as we understand.

It is now alleged by the sitting senators, respectively, as we understand the substance of their allegations, in contradiction of the Senate Journal, that the three State senators whose seats were contested were not legally elected and qualified; that they were without the expressly required credentials, the certificate of the proper and only returning officer, and that they were, notwithstanding, directed to be sworn in by a presiding officer chosen for the purpose by the members of the senate designated as republicans, for the clear purpose, illegal and fraudulent, in fact, of defeating an election of senators of the United States.

Mr. PUGH, in opening the case in the senate, added somewhat to this statement. After the senate had distinctly refused to go into the election of a senator, the speaker made the following announcement from the chair:

Gentlemen of the House of Representatives:

The constitution of the State of Indiana requires that the speaker shall open and publish the returns of the election for governor and lieutenant governor, in the presence of both houses of the general assembly; and as the official terms of the governor and lieutenant governor elect commence this day, I have communicated an invitation to the senate to meet the house in this hall, and, in obedience to the constitution, I shall, so soon as the senate appear, proceed to publish the returns for governor and lieutenant governor.

Mr. Kerr offered the following preamble and resolutions:

Whereas the speaker of this house has announced his intention to proceed forthwith in this hall to open and publish the election returns for governor and lieutenant governor, in pursuance of the requisitions of the constitution, and has given the senate notice thereof:

Resolved, That the house will attend upon the appointment of the speaker in the discharge of the duties devolved upon them by the constitution, and that seats be provided for the members of the senate on the right of the speaker's seat.

Resolved further, That the senate be informed of the same, and that the house is now ready to proceed to said business.

Which were agreed to.

Upon the receipt of this summons from the speaker of the house, Lieutenant Governor Willard announced to the senate that his term of office was about to expire, and required the senators to proceed with him to the hall of the house of representatives, in order to discharge the last duty imposed on him, and one of the most important duties enjoined on them by the constitution of the State. Twenty-six senators followed him; and a convention of the two houses was thereupon duly organized, the lieutenant governor, as president, in the chair. The speaker of the house proceeded, as appears by the journal, to count the votes for governor. The journal of the house of representatives says:

"The speaker of the house of representatives then, in the presence of both houses of the general assembly, proceeded to open the returns of the votes cast for governor and lieutenant governor of the State of Indiana, on the 14th day of October, 1856; and, on counting all the votes returned, it appeared therefrom that, for the office of governor Ashbel P. Willard had received 117,981 votes; Oliver P. Morton had received 112,139 votes.

"Ashbel P. Willard, having received a majority of all the votes cast, was, by the speaker of the house of representatives, in the presence of both houses of the general assembly of the State of Indiana, declared duly elected governor of the State of Indiana, to serve as such for the term of four years from and after the second Monday in January, A. D. 1857."

That announcement having been made, Governor Willard resigned the chair of the joint convention to one of the senators, Mr. Tarkington, and thereupon was sworn into office by one of the judges of the supreme court, and delivered his inaugural address. The speaker of the house proceeded further to count the votes for lieutenant governor, and the journal says:

"For the office of lieutenant governor it appeared, from the returns aforesaid, that Abram A. Hammond had received 116,717; Conrad Baker had received 111,620.

"Abram A. Hammond, having received a majority of all the votes cast, was, by the speaker of the house of representatives, in the presence of both houses of the general assembly, declared duly elected lieutenant governor of the State of Indiana for the term of four years from and after the second Monday of January, A. D. 1857.

"Abram A. Hammond was then sworn into office by the Hon. Samuel E. Perkins, one of the judges of the supreme court."

The presiding officer of the joint convention, Senator Tarkington, then adjourned the convention until the 2d day of February, 1857. In the afternoon Lieutenant Governor Hammond, who was thus inducted into office, returned with the twenty-six senators into the senate chamber, and took his seat as president of the body in the presence of all the members, and delivered his inaugural address. He continued to preside, without dispute as to his title, to the end of the session, and is at present in office.

On the 2d of February, 1857, when the time arrived for the adjourned session of the joint convention, Lieutenant Governor Hammond required the senators to repair with him to the hall of the house of representatives pursuant to the adjournment. On this occasion twenty-four senators accompanied him. The convention was then, by the order of its presiding officer, again adjourned until the 4th of February, 1857, at nine o'clock in the morning. When that hour arrived, Lieutenant Governor Hammond required the senate to repair to the house of representatives, in pursuance of the adjournment. But twenty-four senators attended on that occasion. Being assembled, I read from the journal of the house:

"WEDNESDAY MORNING, 9 O'CLOCK, *February* 4, 1857.

"The hour for the meeting of the joint convention of the two houses of the general assembly having arrived, the senate, preceded by the lieutenant governor, appeared within the hall of the house, where seats were provided for them on the right of the speaker's chair.

"Upon calling the convention to order, the president, with the consent of the joint convention, appointed Solon Turman secretary thereof, who was duly sworn in as such by the Hon. Samuel Perkins, one of the judges of the supreme court, and entered upon the discharge of his duties.

"The chairman addressed the convention as follows:

"'GENTLEMEN: Pursuant to adjournment on Monday, February 2, 1857, we are assembled in joint convention, under a provision of the constitution of the State of Indiana, and you will now proceed to choose a United States senator by a *viva voce* vote, to serve as such until the 4th of March, 1861.'"

They proceeded to vote, and it appears that Graham N. Fitch received eighty-three votes, and George G. Dunn two votes. Mr. Fitch was thereupon declared elected by the president of the convention. They then proceeded to choose a senator for the term ending March 4, 1863, and Jesse D. Bright received eighty-three votes, and Richard W. Thompson two votes; whereupon Mr. Bright was declared elected.

The Senate agreed to the resolution reported by the Judiciary Committee—yeas 30, nays 23.

In the second session of the thirty-fifth Congress Messrs. Lane and McCarty appeared in the Senate claiming seats as senators from Indiana. All the facts in the case are stated in Mr. Bayard's report from the Judiciary Committee which was made February 3, 1859. It is as follows:

The Committee on the Judiciary, to whom was referred the memorial of the State of Indiana, by her representatives and senators in general convention assembled, representing that it is her wish and desire that the honorable Henry S. Lane and the honorable William Monroe McCarty be admitted to seats in the Senate of the United States, as the only legally elected and constitutionally chosen senators of that State, submit the following report:

That the honorable Graham N. Fitch, on the 9th day of February, 1857, was admitted by the Senate, on the customary *prima facie* evidence of his election, as a senator from the State of Indiana, to serve as such until the 4th day of March, A. D. 1861; was qualified, and took his seat as a senator. On the same day resolutions of the senate of Indiana adverse to the legality of his election, and a protest of certain members of the house of representatives of the same State against the validity of the election, were presented to the Senate; and the credentials of Mr. Fitch, the resolutions of the senate of Indiana, and the protest of the members of the house of representatives against the validity of the election, were referred to the Committee on the Judiciary.

The committee, on the 26th of February, reported a resolution authorizing testimony to be taken, both by the sitting members and the protestants, in rela-

tion to all matters of fact contained in their respective allegations. This report was ordered to lie upon the table on the 2d of March, 1857; and no further action was had upon the subject during that session. At the called session of the Senate, the papers on file relating to the election of Mr. Fitch were, on the 9th of March, 1857, on motion of Mr. Trumbull, referred to the Committee on the Judiciary; and on the 14th of March the committee reported a resolution authorizing testimony to be taken—slightly variant from the resolution reported at the preceding session. The resolution was on the same day ordered to lie on the table. The credentials of the honorable Jesse D. Bright, elected a senator from the State of Indiana, to serve as such until the 4th day of March, 1863, were presented to the Senate and read on the 2d day of March, 1857; and at the called session of the Senate, on the 4th day of March, A. D. 1857, Mr. Bright was qualified and took his seat. At the first session of the present Congress, on the 17th of December, 1858, on motion of Mr. Trumbull, the credentials of the sitting members from Indiana, together with all papers on file protesting against their right to seats, or relating to their election as senators in Congress by the legislature of Indiana, were referred by the Senate to the Committee on the Judiciary. On the 21st of January, 1858, the committee made a report, concluding with a resolution similar to the resolution which had previously been reported in relation to the case of Mr. Fitch, authorizing testimony to be taken; and on the 25th of the same month Mr. Trumbull submitted the views of the minority of the committee.

Both the report of the committee and the views of the minority were printed and are appended as part of this report, with a view to the illustration of the questions presented to the Senate, upon which its decision was subsequently made.

On the 16th of February, 1858, the consideration of the resolution reported by the committee was resumed, and after the rejection of some proposed amendments, and the adoption of others, the following resolution was passed by the Senate:

Resolved, That in the case of the contested election of the honorable Graham N. Fitch and the honorable Jesse D. Bright, senators returned and admitted to their seats from the State of Indiana, the sitting members and all persons protesting against their election, or any of them, by themselves or their agents or attorneys, be permitted to take testimony on the allegations of the protestants and the sitting members, touching all matters of fact therein contained, before any judge of the district court of the United States, or any judge of the supreme or circuit courts of the State of Indiana, by first giving ten days' notice of the time and place of such proceeding in some public gazette printed at Indianapolis: *Provided*, That the proofs to be taken shall be returned to the Senate of the United States within ninety days from the passage of this resolution: *And provided*, That no testimony shall be taken under this resolution in relation to the qualification, election, or return of any member of the Indiana legislature.

Testimony was subsequently taken by the protestants, which was, together with certain affidavits, presented on behalf of the sitting members, and documentary evidence referred to the Committee on the Judiciary, and on the 24th of May, 1858, Mr. Pugh, from that committee, reported the following resolution:

Resolved, That Graham N. Fitch and Jesse D. Bright, senators returned and admitted from the State of Indiana, are entitled to the seats which they now hold in the Senate, as such senators aforesaid, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863, according to the tenor of their respective credentials.

This resolution and the accompanying documents were on the same day ordered to be printed.

The resolution was under consideration in the Senate, and fully debated at several subsequent times, and was finally, after the rejection of several proposed amendments, passed by the Senate without amendment or alteration. In the opinion of the committee, this resolution (no motion having been made to reconsider it) finally disposed of all questions presented to the Senate involving the

respective rights of the Hon. Graham N. Fitch and the Hon. Jesse D. Bright to their seats in the Senate as senators from the State of Indiana for the terms stated in the resolution. It appears by the memorial that the legislature of Indiana, at its recent session in December last, assumed the power of revising the final decision thus made by the Senate of the United States, under its unquestioned and undoubted constitutional authority to "be the judge of the qualifications of its own members." Under this assumption, it also appears by the journals of the senate and house of representatives of the State of Indiana. the legislature of Indiana, treating the seats of the senators from that State as vacant, proceeded, subsequently, by a concurrent vote of the senate and house of representatives of the State, to elect the Hon. Henry S. Lane as a senator of the United States for the State of Indiana, to serve as such until the 4th of March, 1863, and the Hon. William Monroe McCarty as a senator for the same State, to serve as such until the 4th of March, A. D. 1861. Under this action of the legislature of Indiana those gentlemen now claim their seats in the Senate of the United States.

It may be conceded that the election would have been valid, and the claimants entitled to their seats, had the legislature of Indiana possessed the authority to revise the decision of the Senate of the United States that Messrs. Fitch and Bright had been duly elected senators from Indiana, the former until the 4th of March, 1861, and the latter until the 4th of March, 1863.

In the opinion of the committee, however, no such authority existed in the legislature of Indiana. There was no vacancy in the representation of that State in the Senate; and the decision of the Senate, made on the 12th of June. 1858, established finally and (in the absence of a motion to reconsider) irreversibly the right of the Hon. Graham N. Fitch as a senator of the State of Indiana until the 4th of March, 1861, and the right of the Hon. Jesse D. Bright as a senator from the same State until the 4th of March, A. D. 1863.

The decision was made by an authority having exclusive jurisdiction of the subject; was judicial in its nature; and, being made on a contest in which all the facts and questions of law involving the validity of the election of Messrs. Fitch and Bright, and their respective rights to their seats, were as fully known and presented to the Senate as they are now in the memorial of the legislature of Indiana, the judgment of the Senate then rendered is final, and precludes further inquiry into the subject to which it relates.

There being, by the decision of the Senate, no vacancy from the State of Indiana in the Senate of the United States, the election held by the legislature of that State at its recent session is, in the opinion of the committee, a nullity. and merely void, and confers no rights upon the persons it assumed to elect as senators of the United States. The committee ask to be discharged from the further consideration of the memorial of the legislature of Indiana.

The following "views of the minority" set forth the law of the case as urged by the contestants:

FEBRUARY 3, 1859.

Mr. COLLAMER submitted the following views of the minority:

The power of the Senate to judge of the election and qualification of its own members is unlimited and abiding. It is not exhausted in any particular case by once adjudicating the same, as the power of re-examination and the correction of error or mistake, incident to all judicial tribunals and proceedings, remains with the Senate in this respect, as well to do justice to itself as to the States represented, or to the persons claiming or holding seats. Such an abiding power must exist, to purge the body from intruders, otherwise any one might retain his seat who had once wrongly procured a decision of the Senate in his favor by fraud and falsehood, or even by papers forged or fabricated.

In what cases and at whose application a rehearing will at all times be granted is not now necessary to inquire; but when new parties, with apparently legal claim, apply, and especially when a sovereign State, by its legislature, makes respectful application to be represented by persons in the Senate legally elected, and insists that the sitting members from that State were never legally chosen, we consider that the subject should be fully re-examined, and that neither the State, the legislature, nor the persons now claiming seats, can legally or justly be estopped, or even prejudiced, by any former proceedings of the Senate to which they were not parties.

At the first session of the legislature of Indiana, after the present sitting members were declared by the Senate as entitled to their seats, and at the earliest time it could take action, it declared their pretended election as inoperative and void, and that the State was in fact unrepresented; and they proceeded to elect H. S. Lane and William M. McCarty as senators of the United States for said State, according to the Constitution of the United States; and they send here their memorial, alleging that the present sitting members were never legally elected; and they show facts, in addition to what was heretofore presented to the Senate, tending, as they consider, to sustain this allegation. The said Lane and McCarty present their certificates and claim their seats. We consider the matters stated in said memorial as true. The said Lane and McCarty have presented their brief sustaining their claim to seats, which is in the words following:

Brief of W. M. McCarty and Henry S. Lane, submitted to the Judiciary Committee of the Senate.

The State is entitled to the office. The legislature is her supreme instrument and donee of the power to elect senators. It is the creature of the constitution, which is the chart of its power, vested only in two co-ordinate branches; a quorum of two-thirds of the members is requisite to give either a legal entity; each is equivalent in power, with an absolute veto on the power of the other.

The legislature is a corporation aggregate, with only such power as its creator has seen fit to endow it with, to be exercised in conformity to the laws of its birth.

To the joint wisdom and counsel of these colleges is the legislative *power* intrusted. It is not parcelled out to its component elements in integrals, neither is it vested in an amalgamated body of the two. The one is erected as a barrier to the other. The ordeal of both must be passed. This guaranty against abuse cannot be broken down without destroying one of the safeguards of our government. The sovereign voice is an unit. The power that utters it is an entirety—an invisible, intangible, artificial person. The power is in the organism called "the general assembly," and not in the individual members. It is not the rights or powers of the members, but the delegated trust powers of the State that are wielded in senatorial elections or other exercises of legislative powers. Without a quorum of either house it did not exist—without either, the legislature did not exist, and without a legislature, no election would be had.

Now, the facts are that a quorum of neither house was present at the pretended election of Messrs. Bright and Fitch, nor even a majority of the senate, nor did either house prescribe the time, place, or manner of electing.

It is of the essence of legislative power that its exercise shall be free from all restraint; each body free to deliberate and act in its duties; each entitled to its full powers. The facts are that *the senate, upon eight occasions, refused to go into joint convention with the house, and at no time consented.* She could not be *compelled* to merge her individuality, or surrender her veto power, or adopt the joint vote mode of electing senators; or, in other words, dilute or annihilate her power, upon the mandate of the house, as that would degrade her from an equal to an inferior. On the contrary, she had the right to determine the time, place, and manner, and did do it by resolution, to elect by *separate* vote, at a proper time, in which the house never concurred. Where diverse duties are imposed, she must determine which are most imperative, and shall have priority.

The constitution of Indiana only provides for a joint convention upon the contingency of a tie vote for governor and lieutenant governor. That contingency did not exist; therefore the convention did not. To say that a duty to form a joint convention creates it is as absurd as to say that the subpœna of a witness works his presence, or the commands of the decalogue their observance.

Failing to get the senate into a joint convention, a false record of that pretended fact was made, to be used as evidence, and which has been used as veritable and true, and the absolute verity and the unimpeachable quality of a record claimed for the fabrication.

The resolves of the senate are those of the whole body. The mutinous senators, who usurped the name and power of the senate in said pretended convention, were subject to arrest by order of that body for absence, and the attempt to nullify the will of the majority by attempting a business at a time, place, and in a manner vetoed by that body, by a resolve, then unvacated and unrescinded. Said convention, if it existed, expired with the duty that called it into life. The president of the senate, when inaugurated governor, his office as president of the senate expired, and with it that of his deputy president. The president not only usurped the power to appoint a clerk—an office not known to the law and void—who only authenticated this pretended election by interpolating it into the journal of the house. This president, whose power expired with that of his creator, arrogated that of adjourning it to a fixed day; in other words, commanding it to obey his arbitrary rescript; and, at a subsequent one, the more imperious mandate, commanded them to proceed to elect senators, no agreement whatever having been had by the house therefor as to time, place, and manner.

We aver that not only did no usage exist in Indiana, but that in no solitary instance was an election had without the consent of both houses, fixing time, place, &c., by law or resolution. While said pretended convention was in existence, but adjourned to a fixed day, numerous attempts were made in both houses to create one by the members who voted for Messrs. Bright and Fitch; thus offering evidence that they did not consider that one *had* been formed and was in existence. No forced convention could be had. Mutual consent was necessary, and it was never had by a vote, which is the only mode of altering the will of a legislative body.

The history of joint conventions in Indiana will also show that no other business was ever transacted than that for which it was specially convened. And we insist that the validity of the acts of a joint convention is due to the separate action of the two houses as the general assembly. It is also necessary to the validity of all elections by corporate bodies that notice be given of the time, &c.; and the journals of neither house show any such notice, or any conventional agreement for the same.

Upon the facts and law above no legal election could have been had.

To sustain the title of Messrs. Bright and Fitch, the constitution of Indiana, depositing her legislative power in two co-ordinate houses, must be broken down—that which requires two-thirds of the members to exercise any of her attributes of sovereignty, and that one house cannot coerce the other. Not only is this election in defiance of these injunctions, but in the face of a positive dissent by one branch, armed by the people with an absolute veto. But a presiding officer, who is no part of the legislature, usurped the powers and prerogatives of the legislature; all the forms and guarantees with which the people hedged in their legislative servant were disregarded, and it is claimed that the act is as valid as if they had been observed.

To sustain Messrs. Bright and Fitch the constitution of Indiana is made a dead letter. Will the Senate, the peculiar guardians of State rights, reared up for that especial purpose, exclude Indiana from her weight and voice in it by instruments empowered by her? Will she be allowed to interpret her own constitution and acts, or will the Senate, under any pretence, blot her out of the confederacy, and realize all of those fears portrayed by some of the framers of the Constitution by an absorption of and encroachment upon State rights?

The legislative power enshrines and protects all rights subject to its jurisdiction. Prior to the confederation the several States owed this duty to their citizens. They did not surrender it, but intrusted it to the federal for their better protection, with the right guaranteed them of a voice in the Senate, as a means of enforcing this duty through the federal instrument.

We deny that under a constitutional grant of power, with prescribed modes of its exhibition, you can discriminate between elections and laws. The selection of a general, upon whose skill the fate of an army or the country may depend, or of a judge upon whose legal attainments and integrity the lives, liberties, and property of the citizen may depend, is of less moment than some petty law.

The same power is as requisite to the creation of the one as the other.

But it may be said that this question is *res adjudicata*.

We deny that our rights or title are barred by a decision had *before they were created*.

We deny that the judicial power of the Senate is capable of self-exhaustion. We deny that the political right of the State is capable of annihilation without annihilating the Constitution which creates the right.

We insist that the right to judge of the election and qualification of members must continue while the term continues.

The qualifications are continuing conditions of title.

We deny that courts are ever estopped by their own action.

We deny that sovereigns are estopped.

We deny that Indiana was, prior to this time, a party to the proceedings of the Senate, or had opportunity to allege or elicit the true facts.

We deny the power of the Senate, under the power to judge, to *create* senators for Indiana.

We claim for her a superior knowledge of her own acts and grants.

We insist that the simple admission of a senator to his seat upon credentials is a decision, and that it was never pretended this precluded his ouster if his title were not good.

If the Senate have not power to exclude foreign elements at all times, it is not equal to the duties intrusted to its guardianship.

And we will not believe that the Senate is the only tribunal on earth whose wrongs, once done, are eternal and irrevocable.

W. M. McCARTY.
H. S. LANE.

In the case of the State of Mississippi, in the House of Representatives in the 25th Congress, the power to re-examine a decision made on an election of members was fully considered and decided. Gholson and Claiborne were, at a special election held on the proclamation of the governor, chosen representatives from that State to a special session of Congress called by the President. At that session exception was taken to them, but after some objection they were admitted to their seats. Their case and papers were referred to the Committee of Elections, who made report, and thereupon, on full and elaborate discussion, it was resolved that they were duly elected members of the 25th Congress, and entitled to their seats. This was in September. In November following an election was holden in said State, and Prentiss and Ward were elected members of the 25th Congress, who, in December following, presented their credentials and claimed their seats. It was then insisted in that case, as it now is in this, that the decision so before made was conclusive of the right of Claiborne and Gholson to their seats as members of the 25th Congress, and the whole matter was *res adjudicata*. But on full examination and after full discussion, the former resolution declaring said Claiborne and Gholson as duly elected members of the 25th Congress was *rescinded*.

We are therefore of opinion that the memorial of the legislature of Indiana should be duly entertained and considered, and the said Lane and McCarty fully heard; and that if, on full examination and hearing, the Senate find that the present sitting members were not duly elected, the resolution declaring them elected should be reconsidered. And if the Senate find that the said Lane and McCarty were legally elected, they should be admitted to their seats.

J. COLLAMER.
L. TRUMBULL.

The Senate laid the whole subject upon the table—yeas 31, nays 20—leaving Messrs. Bright and Fitch in possession of their seats.

NOTE.—The debate in this case will be found as follows: 34th Congress, 3d session, pages 626, 774, 907, 1034, 1040. Special session 35th Congress, pages 385, 392, 396. 35th Congress, 1st session, pages 355, 724, 2353, 2981. 35th Congress, 2d session, pages 599, 534, 772, 959.

THIRTY-SEVENTH CONGRESS, FIRST AND SECOND SESSIONS

STANTON *vs.* LANE, *of Kansas.*

It was held by the Committee on the Judiciary (unanimously) that Mr. Lane accepted the office of brigadier general, and that by so doing he virtually resigned his seat. Some of these facts were disputed in the Senate, and the subject was "indefinitely postponed."

IN THE SENATE,

AUGUST 2, 1861.

Mr. FOSTER, from the Committee on the Judiciary, made the following report:

That the contestant and sitting member have appeared before them and submitted, severally, their statements and made their exhibits.

The committee find the following facts: That the sitting member, the Hon. James H. Lane, was, by the Executive, appointed a brigadier general in the

volunteer forces of the United States on the 20th of June, 1861; that he accepted said appointment, and was legally qualified to perform its duties.

In the opinion of the committee the office of brigadier general under the United States is incompatible with that of member of either house of Congress. By accepting the office of brigadier general, the sitting member, Mr. Lane, virtually resigned his seat in the Senate, and it became vacant at that time.

On the 8th day of July, 1861, the governor of Kansas gave to the contestant, Mr. Stanton, a commission in due form appointing him a senator of the United States from the State of Kansas to fill the aforesaid vacancy, and by virtue of that commission Mr. Stanton now claims his seat.

Your committee recommend the adoption of the following resolutions:

1. *Resolved*, That James H. Lane is not entitled to a seat in this body.
2. *Resolved*, That Frederic P. Stanton is entitled to a seat in this body.

The evidence from which your committee find the facts herein set forth is, substantially, the following:

WAR DEPARTMENT, *July* 15, 1861.

SIR: In reply to your inquiry in regard to the appointment of the Hon. James H. Lane as brigadier general, I herewith transmit you documents upon the case:

A. Copy of letter to Secretary of War from Adjutant General Thomas.
B. Form of appointment, (printed blank.)
C. Telegram from Assistant Adjutant General to commanding officer at Fort Leavenworth.
D. Letter of acceptance of regiments.

The Secretary of War directs me to state that he himself, after having signed the commission of Hon. James H. Lane, as brigadier general, handed it personally to him in presence of the Adjutant General, at the War Department.

Respectfully,

JAMES LESLEY, JR.,
Chief Clerk, War Department.

Hon. F. P. STANTON.

A.

ADJUTANT GENERAL'S OFFICE, *Washington, July* 15, 1861.

SIR: In reply to the inquiry of the Hon. F. P. Stanton of the 13th instant, referred by you to this office, I respectfully state that on the 20th ultimo you directed an appointment as brigadier general of the three-years volunteers to be made for the Hon. James H. Lane, of Kansas. The appointment was made as directed, and handed to you for signature, but was not returned to this office for record.

I enclose herewith a blank letter of appointment, similar to the one used in his case.

I have the honor to be, sir, very respectfully, your obedient servant,

L. THOMAS, *Adjutant General.*

Hon. SIMON CAMERON, *Secretary of War.*

B.

WAR DEPARTMENT, *Washington, June* 20, 1861.

SIR: You are hereby informed that the President of the United States has appointed you brigadier general of the volunteer force raised in conformity with the President's proclamation of May 3, 1861, in the service of the United States, to rank as such from the 17th day of May, 1861. Should the Senate, at their next session, advise and consent thereto, you will be commissioned accordingly.

Immediately on receipt hereof, please to communicate to this department, through the Adjutant General's office, your acceptance or non-acceptance of said appointment; and, with your letter of acceptance, return to the Adjutant General of the army the oath, herewith enclosed, properly filled up, subscribed, and attested, reporting at the same time your age, residence, when appointed, and the State in which you were born.

Should you accept, you will at once report by letter for orders to the Secretary of War.

Brig. General JAMES H. LANE,
United States Volunteers.

The original of which this purports to be a copy was not produced before the committee. General Lane stated that it was in the hands of Colonel Weer, at Leavenworth, General Lane also stated that there was a variation, in some

respects, between this copy and the original, but no variation was specified which the committee deemed material.

C.

[By telegraph.]

ADJUTANT GENERAL'S OFFICE,
Washington, D. C., July 10, 1861.

Detail an officer to muster in General Lane's brigade. The companies will be mustered when presented, even though less than the standard, and will be filled up afterwards.

By order:

GEO. D. RUGGLES,
Assistant Adjutant General.

COMMANDING OFFICER, *Fort Leavenworth, Kansas,*
Leavenworth City, Kansas.

Official copy.

L. THOMAS,
Adjutant General.

ADJUTANT GENERAL'S OFFICE, *July* 16, 1861.

The above order was given at the request of General Lane.

L. THOMAS,
Adjutant General.

ADJUTANT GENERAL'S OFFICE, *July* 16, 1861.

D.

WAR DEPARTMENT, *June* 20, 1861.

DEAR SIR: This department will accept two regiments for three years or during the war, in addition to the three regiments the department has already accepted from the governor of Kansas, to be raised and organized by you in Kansas. Orders will be given to muster the same into service immediately on being ready to be so mustered; and on being mustered, the requisite arms, &c., will be furnished on the requisition of the mustering officer, who is hereby authorized to make the same.

By order of the President:

SIMON CAMERON,
Secretary of War.

General JAMES H. LANE.

Official copy.

J. LESLEY, JR.,
Chief Clerk.

I, John D. Clark, justice of the peace in and for Washington county, District of Columbia, do hereby certify that on or about the 20th day of June last General James H. Lane swore to and subscribed the form of the within oath before me, which I duly certified and delivered to him.

Given under my hand this 15th July, 1861.

JOHN D. CLARK, *J. P.*

By request of Mr. Stanton.

I, James H. Lane, appointed a brigadier general in the army of the United States, do solemnly swear, or affirm, that I will bear true allegiance to the United States of America; and that I will serve them honestly and faithfully against all their enemies or opposers whatsoever, and observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the rules and articles for the government of the armies of the United States.

Sworn to and subscribed before me, at ———, this —— day of ———, 186 .

———,
Justice of the Peace.

The following article appeared in the Daily Times, of Leavenworth, on the 26th of June last:

LEAVENWORTH, *June* 25, 1861.

MR. EDITOR: On the 20th instant I was duly appointed a brigadier general in the volunteer force of the United States, and thereupon received the following order:

WAR DEPARTMENT *June* 20, 1861.

DEAR SIR: This department will accept two regiments for three years or during the war, in addition to the three regiments the department has already accepted from the governor of Kansas, to be raised and organized by you in Kansas. Orders will be given to muster the same into service immediately on being ready to be so mustered; and on being mustered, the requisite arms, &c., will be furnished on the requisition of the mustering officer, who is hereby authorized to make the same.

By order of the President:

SIMON CAMERON,
Secretary of War.

General JAMES H. LANE.

Fellow-citizens of Kansas and adjoining States and Territories:

The important trust thus confided to me has occurred at a momentous period in our history as a nation. An insurrectionary war, commenced by rebels, in defiance of patriotism and duty, has now approached our border. Treason has raised its bloody hand, almost in our very midst, to strike down our glorious flag, made blessed by the memories of our fathers. The horrors of war are no longer far removed from us, but have been brought by traitorous hands to our very hearthstones. Impressed with the necessity of prompt and vigorous action in defence of our country, its flag, and our homes, the President has authorized the formation of a brigade of five regiments in Kansas. He has been pleased to place in my hands the honor of leading the gallant sons of the youngest State of the Union to victory in defence of that Union of which it has so lately become a part. Treason and rebellion surround us. Loyal American citizens, driven from their homes, are crying to us for protection. The best government in the world is assailed by wicked hands. Men of Kansas and the surrounding country, in the name of all we hold sacred, and by the authority of our constitutional ruler, I invoke you to rally to the stars and stripes; come forward and join the regiments accepted from our State. When organized, the watchword of the brigade will be the downfall of treason wherever found, and the upholding of Union men in every State and place.

JAMES H. LANE,
Brigadier General.

General Lane stated to the committee that he wrote the body of the address only, and did not affix his name as brigadier general.

The requisitions mentioned in the following letter of General Meigs were read before the committee by General Lane; he stated that he made them, but did not sign them as brigadier general, nor was that title annexed to his name. The requisitions, not being in possession of the committee, are not inserted in this report.

QUARTERMASTER GENERAL'S OFFICE,
Washington City, June 26, 1861.

SIRS: I am informed that you are able and willing to supply the regulation uniforms for two regiments, including four companies of cavalry, four companies of mounted artillery, and twelve companies of infantry, subject to regulation, inspection as to work and material, and at the United States prices.

This clothing is for two regiments to be raised and commanded by General Lane, of Kansas, and must be delivered in time to reach Fort Leavenworth before the 20th July, at which time the regiment is to take the field.

I enclose General Lane's requisitions, three in number, specifying the articles, and indorsed by me for identification. Also a copy of Order No. 23, of November 30, 1859, fixing prices.

Be good enough to signify by telegraph your acceptance or rejection of this order, and if rejected return the requisitions by bearer.

When ready for inspection a United States inspector will be sent to Boston to look at them.

M. C. MEIGS,
Quartermaster General.

Messrs. HAUGHTON, SAWYER & CO., *Boston, Mass.*

The above is a true copy.

M. C. MEIGS,
Quartermaster General.

The subject was recommitted to the Judiciary Committee in the second session, and the resolutions were reported a second time. The Senate postponed the subject "indefinitely."

NOTE.—This case will be found in the Congressional Globe, 37th Congress, second session, pages 185, 222, 291, 336, 359, 363.

THIRTY-EIGHTH CONGRESS, FIRST SESSION.

WM. M. FISHBACK and ELISHA BAXTER, *of Arkansas.*

In these cases of two claimants to seats in the Senate, the Judiciary Committee held, when the rebellion in a revolted State shall have been so far suppressed that the loyal inhabitants are free to establish their State government upon a republican foundation, and by the aid and not in subordination to the military to maintain the same, it will be entitled to representation in Congress. Believing that such a state of things did not exist in Arkansas, the committee recommended the Senate not to admit the claimants. The report was adopted

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IN THE SENATE,

JUNE 27, 1864.

Mr. TRUMBULL, from the Committee on the Judiciary, submitted the following report:

That the credentials presented are in due form, purporting to be under the seal of the State of Arkansas, and to be signed by Isaac Murphy, governor thereof; and if the right to seats were to be determined by an inspection of the credentials, Messrs. Fishback and Baxter would be entitled to be sworn as members of this body. It is, however, admitted by the persons claiming seats, and known to the country, that, in the spring of 1861, the State of Arkansas, through its constituted authorities, undertook to secede from the Union, set up a government in hostility to the United States, and maintain the same by force of arms. Congress, in view of the condition of affairs in Arkansas and some other States similarly situated, passed an act, July 13, 1861, authorizing the President, in case of an insurrection in any State against the laws of the United States, and when the insurgents claimed to act under the authority of the State, and such claim was not repudiated, nor the insurrection suppressed by the persons exercising the functions of government in such State, to declare the inhabitants of such State, or part thereof where such insurrection existed, to be in a state of insurrection against the United States; and that, thereupon, all commercial intercourse by and between the same and the citizens of the United States, except under license and upon certain conditions, should cease and be unlawful so long as such condition of hostility should continue.

In pursuance of this act the President, August 16, 1861, issued his proclamation declaring the inhabitants of the State of Arkansas, except the inhabitants of such parts thereof as should maintain a loyal adhesion to the Union and the Constitution, or might be from time to time occupied and controlled by forces of the United States engaged in the dispersion of said insurgents, to be in a state of insurrection against the United States, and that all commercial intercourse between them and citizens of other States was and would be unlawful, except when carried on under special license, until such insurrection should cease. At the date of this proclamation no part of the State of Arkansas was occupied and controlled by the forces of the United States, nor did the inhabitants of any part of the State, at that time, publicly maintain a loyal adhesion to the Union and the Constitution. Hence, upon the issuing of said proclamation, a state of hostility or civil war existed between the inhabitants of the State of Arkansas and the United States, and there was not at that time any organized authority in Arkansas, loyal to the Constitution, competent to choose or appoint senators of the United States. It is claimed, however, that since that period the State, or the greater portion of it, has been occupied and controlled by the forces of the United States engaged in the dispersion of the insurgents, and that the inhabitants of said State, loyal to the Union and the Constitution, have reorganized their State government, and have the right, through the legislature they have instituted, to choose two senators for said State.

The Constitution declares that "the Senate of the United States shall be composed of two senators from each State, chosen by the legislature thereof, for six years," and make each house "the judge of the election, returns, and qualification of its own members." In the investigation of the claimants' right to seats, the first question to be determined is, was the body by whom they were elected clothed with authority to elect senators; in other words, was it, in a constitutional sense, "the legislature of Arkansas?"

A question similar to this arose some years since between Robbins and Potter, each claiming to have been elected senator by the legislature of Rhode Island, though by different bodies. In that case the Senate was called upon to decide, and did decide, which of the two bodies, each claiming to be legitimate, was the legislature contemplated by the Constitution. The Supreme Court of the United States, in the case of Luther *vs.* Borden, growing out of the political difficulties in Rhode Island in 1841 and 1842, held that "when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority; and its decision is binding on every other department of the government."

The claimants laid before the committee a statement of the circumstances attending the assembling of the body by which they were elected, in which, after detailing the condition of the State while under rebel control, and prior to September, 1863, they say:

Upon the advent of the Union army the rebels in the State, guerillas and all, for the most part, left with their armies, leaving about two-thirds of the State comparatively free from guerilla depredation.

The Union men came flocking from the mountains, where they had lain for two years, to the federal standard, and nearly every man whom the medical examiners would receive joined the federal army.

Those who were rejected, (and their number was enormous, their constitutions having been broken by exposure and their hardships,) and those whom circumstances prevented from joining the army, found themselves, so far as law was concerned, in a state of chaos. Many of them, living remote from military posts, had not even the protection of military law.

Immediately they began to agitate the question of reorganization of their State government. They first moved in primary meetings, and on the 30th of October, 1863, they held a mass meeting in the city of Fort Smith, in which some twenty counties are said to have been represented, and at which they called upon all the counties in the State to elect delegates (after having elected commissioners of election) to a State convention, to be held in the city of Little Rock on the 8th day of January, 1864, for the purpose of so amending the constitution as to abolish slavery. Simultaneously with this meeting, meetings were held in a number of other counties. In every single one (in ignorance of the action of others in many instances) they declared for a convention and for the abolition of slavery.

Commissioners of election were first elected, and they held the elections for the delegates.

All this was prior to the President's amnesty proclamation.

When the convention met forty-five delegates were present, representing about half of the State. (Several of the delegates failed to attend.) They repudiated the rebel debt, State and confederate, abolished slavery, and submitted the constitution to the people for their ratification. They also provided for taking the vote for State and county officers, and members of the legislature, at the same time with the vote for the ratification of the constitution.

The result of those elections was 12,177 for the constitution and 226 against it, an election of State and county officers, an election of delegates to the lower house of Congress, and a representation in the State legislature from forty-six of the fifty-four counties of the State.

The number of persons in Arkansas who voted for President in 1860 was 54,053, less than one-fourth of whom, as appears from the statement of the claimants, took part in the reorganization of the State government. This, however, would not be fatal to the reorganization, if all who were loyal to the Union had an opportunity to participate, and the State was free from military control. Such, however, is understood not to have been the case. The President had not then, nor has he up to this time, recalled his proclamation, which declared the inhabitants of Arkansas in a state of insurrection against the United States, nor was there any evidence before the committee that said insurrection had ceased or been suppressed. At the time when the body which chose the

claimants was elected, when it assembled, and at this time, the State of Arkansas is occupied by hostile armies, which exercise supreme authority within the districts subject to their control. While a portion of Arkansas is at this very time, as the committee are informed, in the actual possession and subject to the control of the enemies of the United States, other parts of the State are only held in subordination to the laws of the Union by the strong arm of military power. While this state of things continues, and the right to exercise armed authority over a large part of the State is claimed and exerted by the military power, it cannot be said that a civil government, set up and continued only by the sufferance of the military, is that republican form of government which the Constitution requires the United States to guarantee to every State in the Union.

When the rebellion in Arkansas shall have been so far suppressed that the loyal inhabitants thereof shall be free to re-establish their State government upon a republican foundation, or to recognize the one already set up, and by the aid and not in subordination to the military to maintain the same, they will then, and not before, in the opinion of your committee, be entitled to a representation in Congress, and to participate in the administration of the federal government. Believing that such a state of things did not at the time the claimants were elected, and does not now, exist in the State of Arkansas, the committee recommend for adoption the following resolution:

Resolved, That William M. Fishback and Elisha Baxter are not entitled to seats as senators from the State of Arkansas.

On the 29th of June, 1864, the Senate agreed to the report—yeas 27, nays 6.

NOTE.—The debate in the Senate upon this case will be found in vol. 53, pages 3285 3360, 3368.

THIRTY-EIGHTH CONGRESS, SECOND SESSION.

R. KING CUTLER and CHARLES SMITH, *of Louisiana.*

Joint action of both houses is necessary before the admission of senators from a State which has been declared in rebellion. The Senate did not act upon the report.

IN THE SENATE,

FEBRUARY 18, 1865.

Mr. TRUMBULL, from the Committee on the Judiciary, made the following report:

The Committee on the Judiciary, to whom were referred the credentials of R. King Cutler and Charles Smith, claiming seats from the State of Louisiana, report:

That in the early part of eighteen hundred and sixty-one the constituted authorities of the State of Louisiana undertook to withdraw that State from the Union, and so far succeeded in the attempt as by force of arms to expel from the State for a time the authority of the United States, and set up a government in hostility thereto.

Since that time the United States, as a necessity to the maintaining of its legitimate authority in Louisiana as one of the States of the Union, has been compelled to take possession thereof by its military forces, and, in the absence of any local organizations or civil magistrates loyal to the Union, temporarily to govern the same by military power.

While a large portion of the State, embracing more than two-thirds of its population, was thus under the control of the military power, steps were taken, with its sanction, and to some extent under its direction, for the reorganization of a State government loyal to the government of the United States. The first action had looking to such reorganization was a registration of the loyal persons within the limits of military control entitled to vote under the constitution and laws of Louisiana at the beginning of the rebellion. The lists thus made up contain the names of between fifteen and eighteen thousand voters, which is represented to be more than half the number of voters in the same parishes previous to the rebellion, and more than two-thirds of the voting population within the same localities at the time the registry was taken. The next step taken in the reorganization of the State government was the election of State officers on the 22d of February, 1864, under the auspices of the military authority acting in conjunction with prominent and influential citizens. At this election 11,414 votes were polled, 808 of which were cast by soldiers and sailors, citizens of Louisiana, who would not have been entitled to vote under the constitution of Louisiana as it existed prior to the rebellion, for the sole reason that they were in the military service, but who possessed in other respects all the qualifications of voters required by that instrument. The balance, 10,606, were legal voters under the constitution of the State prior to the rebellion. The third step in the reorganization of the State government was to call a convention for the amendment of the constitution of the State. Delegates to this convention were elected March 28, 1864, under the joint and harmonious direction of the military authorities, and the State officers who had been elected on the 22d February previous. In a paper submitted to the committee by Major General Banks he states that delegates were apportioned to every election district in the State, both within and beyond the lines, so that if beyond the lines of the army the people of the State had chosen to participate in that election, the delegates might have been received if they had shown themselves loyal to the government. They were about 150 in number. All elections subsequent to that for delegates have been ordered and controlled by the representatives of the people.

In the organization of the convention it was provided that a majority of the whole number apportioned to the State, if every district within and beyond the lines had been represented, should constitute a quorum for the transaction of business. Every vote in the convention, from a question of order to the ratification of the constitution, was conducted under this rule, and was approved by a majority of all the delegates apportioned to the State if every district had been represented.

The delegates met in convention, in the city of New Orleans, on the 6th day of April, 1864, remained in session till July 23, 1864, and adopted a constitution, republican in form, and in entire harmony with the Constitution of the United States and the great principles of human liberty.

This constitution was submitted, by the convention which adopted it, to the people for ratification, on the first Monday of September, 1864, and adopted by a vote of 6,836 for, to 1,566 against it.

At the same time the vote was taken on the adoption of the constitution, a legislature was elected, representing all those parishes of the State reclaimed from insurgent control, and embracing about two-thirds of its population. This legislature assembled at New Orleans on the 3d day of October, 1864, and proceeded to put in operation a State government by providing for levying and collecting taxes, the establishment of tribunals for the administration of justice, the adoption of a system of education, and such other measures as were necessary to the re-establishment of a State government in harmony with the Constitution and laws of the United States. The State government thus inaugurated has been in successful operation since the period of its establish-

[redacted] committee are assured that if no exterior hostile force is per-

mitted to enter the State, the local State government is fully equal to the maintaining of peace and tranquillity throughout the State, in subordination to the Constitution and laws of the United States.

The manner in which the new State government was inaugurated is not wholly free from objection. The local State authorities having rebelled against the government, and there being no State or local officers in existence loyal to its authority, in taking the initiatory steps for a reorganization, some irregularities were unavoidable, and the number of voters participating in this reorganization is less than would have been desirable. Yet, when we take into consideration the large number of voters who had left the State in consequence of the rebellion, who had fallen in battle, or were absent at the time of the election, both in the Union and rebel armies, and the difficulties attending the obtaining of a full vote from those remaining, in consequence of the unsettled condition of affairs in the State, and the further fact that the adoption of the amended constitution was not seriously opposed, and therefore the question of its ratification not calculated to call out a full vote, the number of votes cast is perhaps as large as could have been expected, and the State government which has been reorganized, as your committee believe, fairly represents a majority of the loyal voters of the State.

Appended hereto is a copy of the various orders and proclamations issued in regard to the election of State officers, delegates to the constitutional convention, and members of the legislature, and also a copy of election laws and instructions relative to the duties of commissioners of elections, issued for the guidance of officers in conducting said election.

Messrs. Cutler and Smith, the claimants for seats, were duly elected senators by the legislature which convened on the 3d day of October, 1864, and but for the fact that, in pursuance of an act of Congress passed on the 13th day of July, 1861, the inhabitants of the State of Louisiana were declared to be in a state of insurrection against the United States, and all commercial intercourse between them and the citizens of other States declared to be unlawful, which condition of things had not ceased at the time of the reorganization of the State government and the election of Messrs. Cutler and Smith, your committee would recommend their immediate admission to seats.

The persons in possession of the local authorities of Louisiana having rebelled against the authority of the United States, and her inhabitants having been declared to be in a state of insurrection in pursuance of a law passed by the two houses of Congress, your committee deem it improper for this body to admit to seats senators from Louisiana, till by some joint action of both houses there shall be some recognition of an existing State government, acting in harmony with the government of the United States, and recognizing its authority.

Your committee therefore recommend for adoption, before taking definite action upon the right of the claimants to seats, the accompanying joint resolution:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the United States do hereby recognize the government of the State of Louisiana, inaugurated under and by the convention which assembled on the 6th day of April, A. D. 1864, at the city of New Orleans, as the legitimate government of said State, entitled to the guarantee and all other rights of a State government under the Constitution of the United States.

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[This Index is frequently more minute than the syllabus in the body of the work. For the sake of economy, and to make the volume a hand-book, the contents have been compressed into a small compass. It contains 32 *more* cases than are included in "Clark & Hall's" "Contested Elections," and 350 pages *less*. The reader will find no difficulty, however, in finding a case or any point in it if he will consult the Index.

Two or three unimportant errors have been discovered after the body of the work has left the press. The second case of "*Segar, of Virginia*" precedes the first, and in the syllabus of "*Reeder* vs. *Whitfield*" (page 215) the word "legislature" appears instead of "people."]

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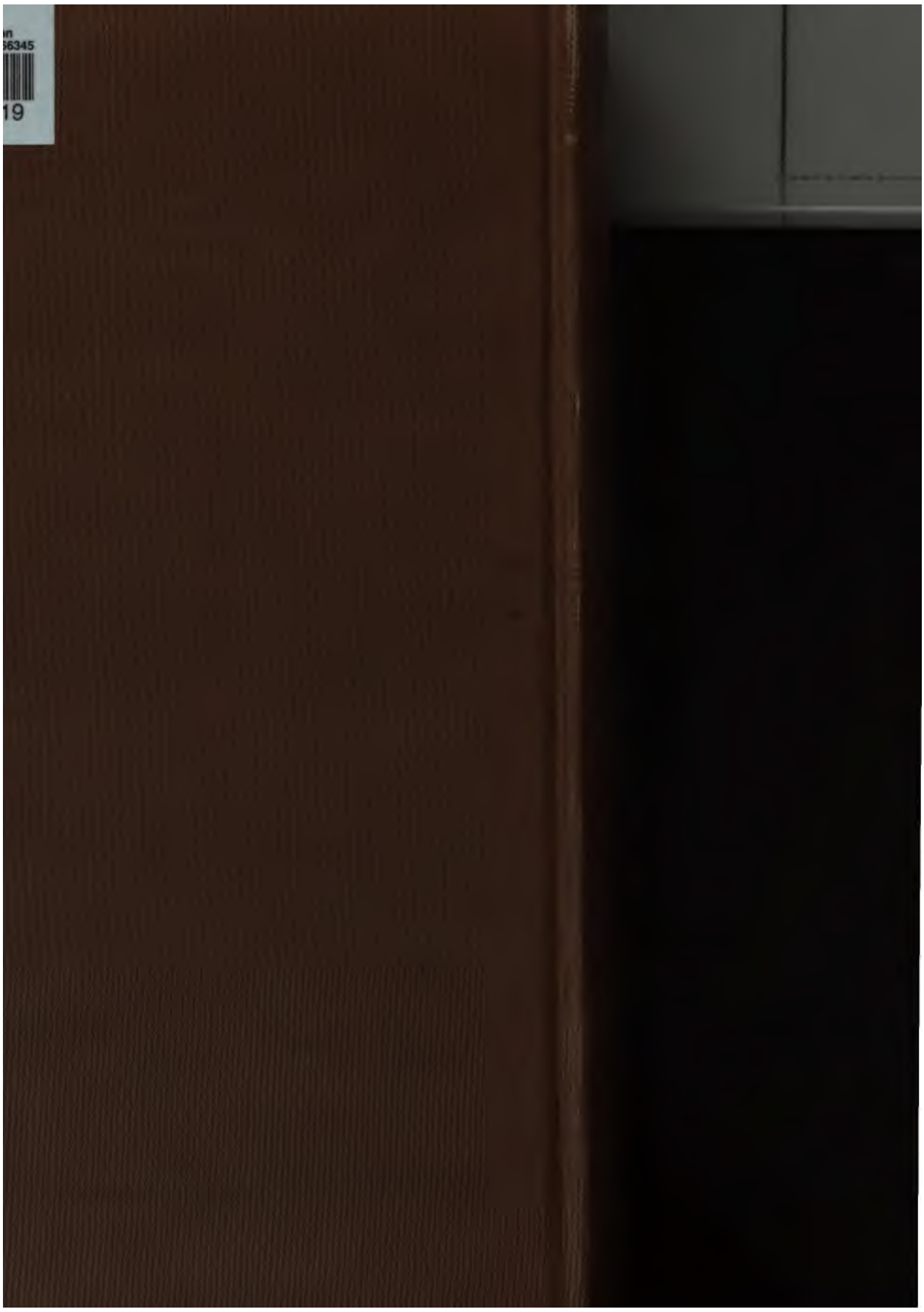
STALL-STUDY

CHARGE